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In The

Supreme Court of the United States

MIDWEST GAS SERVICES, INC.
and MIDWEST GAS STORAGE, INC.,

Petitioners,

v.

INDIANA GAS COMPANY, INC.,
INDIANA ENERGY SERVICES, INC.,
and PROLIANCE ENERGY, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

TODD A. RICHARDSON
Counsel of Record
JOHN F. WICKES, JR.
LEWIS & KAPPES
1700 One American Square
Indianapolis, Indiana 46282-0003
(317) 639-1210

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether antitrust claims against a regulated gas utility and its unregulated marketing affiliates were properly dismissed on the grounds that the plaintiffs did not adequately plead antitrust injury and antitrust standing, where the complaint alleged harm to the competitive market and harm to the plaintiffs as competitors?

2. Whether a claim of unlawful tying must be supported by allegations of injury caused by an independent violation such as predatory pricing, as opposed to injury caused simply by the foreclosure of competition on the merits in the market for the tied product?

CORPORATE DISCLOSURE STATEMENT

All parties are listed in the caption. The parent of Midwest Gas Services, Inc., and Midwest Gas Storage, Inc., is Midwest Energy Holding Corporation. None of those companies are publicly held, and no publicly held corporation owns 10% or more of their stock.

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I. OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Seventh Circuit that gave rise to this petition is published as *Midwest Gas Services, Inc. v. Indiana Gas Co.*, 317 F.3d 703 (7th Cir. 2003), and is reprinted in the Appendix bound herewith at pages 1a through 20a. The Seventh Circuit denied a petition for rehearing and suggestion for rehearing en banc on February 19, 2003, in an unpublished order that is reprinted at Appendix page 86a. The Seventh Circuit decision affirmed in part and reversed in part a series of rulings by the United States District Court for the Southern District of Indiana dismissing all claims of the plaintiffs, as set forth in a June 22, 2001 Entry on Plaintiffs' Renewed Motion for Certification of Final Judgments for Immediate Appeal Pursuant to Fed. R. Civ. P. 54(b), a June 22, 2001 Entry on Plaintiffs' Motion to Reconsider Dismissal Orders and to Grant Relief from Judgments, a May 29, 2001 Final Judgment in favor of all defendants, a May 29, 2001 Entry on Defendant Indiana Energy Services' Motion for Judgment on the Pleadings, an April 20, 2001 Entry on Defendant ProLiance Energy's Motion to Dismiss Plaintiffs' First Amended Complaint, an April 20, 2001 Final Judgment in favor of defendant ProLiance Energy, LLC, an April 20, 2001 Sua Sponte Entry on Defendant Indiana Gas' Motion to Correct Errors, and an April 20, 2001 Final Judgment in favor of defendant Indiana Gas Company, Inc. The District Court entries and judgments are unpublished and are reprinted at pages 21a through 85a of the Appendix.

II. JURISDICTIONAL STATEMENT

Plaintiffs Midwest Gas Services, Inc. ("Midwest Gas Services") and Midwest Gas Storage, Inc. ("Midwest Gas

Storage") (collectively the "Midwest Companies") filed their complaint seeking relief for violations of the federal antitrust laws and the laws of the State of Indiana. The District Court's jurisdiction over the federal antitrust claims arose under 28 U.S.C. §§1331 and 1337, and its jurisdiction over the substantially related state law antitrust and tortious interference claims arose under 28 U.S.C. §1367. On April 20, 2001, the District Court dismissed all claims against two of the three defendants. 37a-85a. A motion to reconsider those dismissals was denied on June 22, 2001. 24a-30a. On May 29, 2001, the District Court dismissed all claims against the remaining defendant (32a-36a) and entered final judgment in favor of all three defendants. 31a. In light of pending counterclaims asserted by one defendant, the District Court granted a request for certification pursuant to Fed. R. Civ. P. 54(b) on June 22, 2001. 21a-23a. The Midwest Companies timely filed their notice of appeal on June 27, 2001. The Seventh Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. §1291. On January 22, 2003, the Seventh Circuit issued its opinion affirming in part and reversing in part. 1a-20a. The Midwest Companies timely petitioned for rehearing and suggested rehearing en banc, but the Seventh Circuit denied that petition on February 19, 2003. 86a. This petition for writ of certiorari is being timely filed in accordance with Rules 13.1 and 13.3 of the Rules of the Supreme Court of the United States. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

III. RELEVANT STATUTES AND RULES

This case raises questions concerning the application of the federal antitrust laws and the rules of civil procedure

governing pleading requirements. Sherman Act §1, 15 U.S.C. §1, provides, in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Sherman Act §2, 15 U.S.C. §2, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, . . .

Clayton Act §4(a), 15 U.S.C. §15(a), provides in pertinent part:

> Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Rule 8(a) of the Federal Rules of Civil Procedure provides:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain: (1) a short and plain statement of the grounds upon

which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

IV. STATEMENT OF THE CASE

This case concerns an anticompetitive conspiracy affecting a competitive market in the partially deregulated natural gas industry, specifically involving the misuse of monopoly resources held by regulated utilities to support an unregulated affiliate's bundled sales in a competitive, unbundled market. The plaintiffs are two related businesses that attempted to compete against the utilities' unregulated affiliate. The context of this case thus parallels that of *Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002), *cert. granted sub nom. Verizon Communications v. Law Offices of Curtis Trinko*, ___ U.S. ___, 123 S. Ct. 1480 (2003) (*"Verizon"*), in which this Court granted certiorari on March 10, 2003. As in *Verizon*, the District Court in this case dismissed the complaint for lack of antitrust injury and antitrust standing. 24a-85a. Unlike *Verizon*, the dismissal of several of the antitrust claims here was affirmed by the Seventh Circuit, which did, however, reverse the dismissal of one antitrust count and a state law tort claim. 1a-20a. This petition addresses the antitrust claims that the Seventh Circuit held were properly dismissed.

The market at issue here arose from deregulatory initiatives in the natural gas industry, as described in

General Motors Corp. v. Tracy, 519 U.S. 278 (1997). The dismissed complaint explained the traditional market structure over most of the past century in which federally regulated interstate pipelines purchased natural gas in production regions at federally regulated rates, transported that gas throughout the nation and then made "bundled" sales of gas commodity and transportation services to state-regulated utilities (also referred to as local distribution companies or "LDCs") serving consumers in particular localities on a monopoly basis. 89a ¶7; *cf. General Motors*, 519 U.S. at 283. Initiatives by Congress and the Federal Energy Regulatory Commission ("FERC") over the past quarter century, however, resulted in a deregulated wholesale gas commodity market and the "unbundling" of interstate pipeline services, so that LDCs and other gas buyers can now purchase gas from a variety of sellers in a competitive wholesale market and pay the interstate pipeline only for the service of transporting it. 89a-90a ¶8; *cf. General Motors*, 519 U.S. at 283-84.

Defendant Indiana Gas Company, Inc. ("Indiana Gas") is an LDC providing natural gas service as a regulated monopoly to consumers in fifty counties in central and southern Indiana. 88a ¶3. As an LDC, it traditionally provided bundled service to consumers, consisting of gas commodity, interstate transportation and local delivery services. 89a-90a ¶8. Starting in the late 1980s, however, the state agency that regulates utilities in Indiana, the Indiana Utility Regulatory Commission ("IURC"), took steps to unbundle Indiana Gas's services to large volume consumers such as industrial and large commercial facilities. *Id.*; 96a ¶¶25-26. *Cf. General Motors*, 519 U.S. at 284 (describing similar Ohio law that permitted industrial consumers

"to buy natural gas from producers or independent marketers, pay interstate pipelines for interstate transportation, and pay LDC's for local transportation"). Such large volume consumers are now "transport-eligible" because they can purchase local transportation only from the LDC, unbundled from gas commodity and interstate transportation. 101a-102a ¶42.

The result is two retail markets: a *captive* market of small volume consumers to whom Indiana Gas sells bundled gas service at IURC-regulated rates and a *competitive* market in which LDCs compete with independent marketers for unbundled sales to large volume consumers that have to pay the utility only for local delivery services. 89a-90a ¶¶8-9, 96a ¶¶25-26. *Cf. General Motors*, 519 U.S. at 301 (noting that "marketers did not serve the Ohio LDCs' core market of small, captive users, typified by residential consumers who want and need the bundled product"); *id.* at 303 ("There is, however, a further market where the respective sellers of the bundled and unbundled products apparently do compete and may compete further."). Many of the gas marketing companies active in the competitive market are corporate affiliates of pipeline companies or LDCs. 90a ¶9.

In order to secure gas supplies for a given location, LDCs, marketers and transport-eligible consumers all require transportation over the interstate pipeline system. 99a-100a ¶36. The right to transport a given volume of gas over a specified portion of a pipeline during a stated time period is referred to as "capacity." In addition to unbundling pipeline sales of capacity from sales of gas commodity, FERC has also introduced competition to sales of pipeline capacity. FERC has flexibly regulated rates at which pipelines sell capacity, but in addition purchasers of

pipeline capacity can resell or "release" the capacity to a replacement shipper based on negotiated or bid-upon terms. 99a-100a ¶36. There is, consequently, a competitive market for released capacity. 99a-100a ¶36, 105a ¶56. Capacity may be firm or interruptible, with firm having a higher scheduling priority and hence greater reliability. 101a-102a ¶¶40, 42. In addition, capacity contracts may designate secondary points of delivery in addition to primary points, but in the event of constraints on the system deliveries may be restricted to primary points. 97a ¶30. Primary firm capacity, therefore, is the most reliable and highest quality transportation service offered by interstate pipelines. 101a-102a ¶¶40, 42.

In order to maintain reliability standards, LDCs regularly purchase considerably more pipeline capacity than is generally needed to serve their captive customers, so that in the event of peak demand, such as extremely cold weather, the LDC will have sufficient capacity to meet the needs of residential and other small volume consumers. 99a-100a ¶36. As a regulated LDC, Indiana Gas was required to periodically release its excess capacity, thereby providing marketers and transport-eligible consumers with access to primary firm capacity deliverable to the Indiana Gas territory. *Id.* In late 1995, however, Indiana Gas entered into a contract with its unregulated marketing affiliate, Indiana Energy Services, Inc. ("IES"), under which Indiana Gas transferred its supply resources to IES and IES became the exclusive supplier of gas and transportation to Indiana Gas. *Id.*; 88a-89a ¶4. The transferred resources included Indiana Gas's interstate pipeline capacity entitlements. 99a-100a ¶36. Where Indiana Gas had regularly released its excess capacity, IES did not. *Id.*

A few months later, Indiana Gas expanded the new arrangement by conspiring with Citizens Gas and Coke Utility ("Citizens Gas"), an otherwise unaffiliated gas utility serving the Indianapolis area. 88a-89a ¶4, 100a ¶37. They formed an unregulated joint venture company, ProLiance Energy, LLC ("ProLiance"), and both utilities transferred their gas supply resources and personnel to ProLiance and then entered into contracts designating ProLiance their exclusive supplier. 100a-101a ¶¶37-38. The transfer of the two utilities' supply resources occurred without competitive bidding and at no cost to ProLiance, which became the largest capacity holder on the entire interstate systems of the two major pipelines serving central Indiana and holder of the vast bulk of the primary firm capacity into Indiana Gas's territory. 97a, 100a-101a ¶¶31, 38, 40.

In addition to its exclusive supply arrangement with the two utilities, ProLiance also operated as a marketer in the competitive market and assumed the business of IES and the marketing affiliate of Citizens Gas. *Id.* Like IES, ProLiance has not released the excess capacity it holds to meet the needs of the captive customers of Indiana Gas and Citizens Gas, the costs of which continue to be subsidized by those consumers through regulated utility rates. Instead, ProLiance has bundled the excess capacity with gas commodity in order to make bundled sales in the competitive market to transport-eligible consumers. 100a-101a ¶38, 101a-102a ¶42, 105a ¶56.

Indiana Gas and Citizens Gas did not seek regulatory approval for the ProLiance arrangement, but a group of consumers filed a complaint with the IURC challenging the arrangement under Indiana utility law and in particular under a statute that allows the IURC to disapprove

contracts between utilities and affiliated entities if found to be contrary to the public interest. 103a ¶45. *See United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790 (Ind. 2000). In an order ultimately affirmed by the Indiana Supreme Court, the IURC found that ProLiance was not a public utility subject to state regulation and declined to disapprove the contracts between ProLiance and the utilities. *Id.*

Midwest Gas Storage owns the only independent gas storage facility in the Indiana Gas territory, which it operates pursuant to FERC certification. 88a ¶2, 90a ¶10, 102a ¶42. Its marketing affiliate, Midwest Gas Services, was a direct competitor of IES and ProLiance. 87a ¶1, 88a-89a ¶4, 90a ¶9. The storage field was strategically located near the two principal pipelines bringing gas to the Indiana Gas territory. 90a-91a ¶11. Development of the storage field presented an opportunity for the Midwest Companies to take advantage of price differentials on the two pipelines by offering transport-eligible consumers in regions ordinarily served by one pipeline more economical gas shipped over the other pipeline and through the storage field. *Id.*; 96a-97a ¶29. In addition, transport-eligible consumers and marketers like Midwest Gas Services could utilize a local storage field to store gas purchased under favorable market conditions for use in times of constraints and high prices. *Id.*; 92a ¶14.

Indiana Gas and its marketing affiliates, ProLiance and IES, took steps to suppress the competitive threat posed by the Midwest Companies and the storage field. In collusion with one of the pipelines, Panhandle Eastern Pipe Line Company ("Panhandle"), Indiana Gas blocked the Midwest Companies' efforts to secure the physical interconnections and contractual receipt point rights

needed to operate the storage field. 92a-100a ¶¶15-24, 30-36. ProLiance and earlier IES, moreover, leveraged their control over the supply resources transferred by the two LDCs for gain in the competitive market, in particular by bundling the excess capacity with gas commodity and selling the bundled product to transport-eligible consumers. 99a-102a, 105a, 107a-108a ¶¶36, 38, 40, 42, 56, 63. With no independent storage field within the territory in which to store gas to meet peak needs and with ProLiance refusing to release the excess capacity, transport-eligible consumers were forced to buy bundled capacity and commodity (or buy from a marketer who made a bundled purchase from ProLiance) in order to get access to the primary firm capacity held by ProLiance. 101a-102a, 105a ¶¶42, 56. ProLiance used its control over transportation into the Indiana Gas system to achieve a large majority of the market share in the market for sales to transport-eligible consumers in the Indiana Gas territory. 101a-102a ¶42.

In the dismissed complaint, the Midwest Companies asserted five counts under the federal antitrust laws, one count under the Indiana antitrust statute and one common law tort count. 103a-111a ¶¶47-77. The District Court's jurisdiction was based on 28 U.S.C. §§1331, 1337 and 1367. The District Court initially denied a motion for judgment on the pleadings by Indiana Gas, but then granted a similar motion to dismiss filed by ProLiance and *sua sponte* reconsidered and granted Indiana Gas's motion. 37a-85a. The dismissal was premised on two grounds: (1) the Midwest Companies supposedly failed to establish antitrust injury and antitrust standing, relying on *Indeck Energy Services, Inc. v. Consumers Energy Co.*, 250 F.3d 972 (6th Cir. 2000), *cert. denied*, 533 U.S. 964 (2001); and (2) the IURC order declining to disapprove the ProLiance

arrangement included a finding about the competitive market that foreclosed an antitrust challenge. *Id.*

In seeking reconsideration of the dismissal orders, the Midwest Companies substantiated the allegations of market abuses by submitting deposition testimony from a third party marketer whose business was affiliated with Panhandle. He confirmed that the availability of primary firm capacity was very limited, that ProLiance generally has not released capacity and that ProLiance has about a two-thirds market share. He testified that Indiana Gas and Citizens Gas threatened to reduce their wholesale purchases from his business or capacity purchases from Panhandle if he continued to compete for sales to transport-eligible consumers, then made good on those threats. He further testified that ProLiance used its position as Panhandle's largest customer to extract anticompetitive assurances, including an agreement that his business would not sell to smaller transport-eligible customers below a threshold consumption level.

The District Court nevertheless denied the reconsideration motion (24a-30a), entered a dismissal in favor of the third defendant, IES (31a-36a), and granted a Fed. R. Civ. P. 54(b) certification to permit an immediate appeal notwithstanding an Indiana Gas counterclaim that remained pending (21a-23a). The Court of Appeals' jurisdiction arose under 28 U.S.C. §1291. The Seventh Circuit reversed, as to Midwest Gas Storage only, the dismissal of the count alleging a conspiracy in restraint of trade between Indiana Gas and Panhandle and, as to both plaintiffs, the common law tort count. 9a-12a, 18a-20a. The Seventh Circuit affirmed the dismissal of all other claims. 9a-18a.

The Seventh Circuit did not, however, adopt the District Court's reasoning. The Seventh Circuit opinion was critical of the District Court's reliance on the distinguishable Sixth Circuit decision in *Indeck*, 250 F.3d 972, and declined to address the theory that the IURC order precluded antitrust remedies. 8a, 14a. Instead, with respect to the claim challenging the ProLiance arrangement as a conspiracy in restraint of trade, the Seventh Circuit found the Midwest Companies lacked antitrust standing. 12a-13a. The opinion indicated that antitrust injury and standing must be pleaded. 9a, 10a. The Seventh Circuit then characterized the arrangement here as merely the "[t]ransfer of a business from one company to another," either without an effect on competition or to an entity "able to more effectively compete." 12a-13a. The opinion analogized the situation to *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), in which the acquisition of failing bowling centers prevented them from going out of business and hence competitors did not suffer antitrust injury from the preservation of competition. 13a. The Seventh Circuit acknowledged that ProLiance may have derived "advantages" from its dealings with Indiana Gas and Citizens Gas, but concluded the Midwest Companies could not acquire standing merely by showing they were injured by the defendants' conduct. *Id.*

With regard to the tying claim, the Seventh Circuit concluded the Midwest Companies had not suffered an antitrust injury. 14a-15a. The opinion found that lost profits resulting from ProLiance's bundled sales were simply lost due to competition and thus did not constitute antitrust injury, and further suggested that, to show antitrust injury, the losses would have to stem from anticompetitive behavior such as predatory pricing. *Id.*

The Seventh Circuit then found the monopolization, attempted monopolization and monopoly leveraging claims to be subject to the same defects as the ProLiance conspiracy and tying counts, and further rejected an essential facilities claim on the ground that the facilities were not essential. 16a-18a.

The Seventh Circuit denied a petition for rehearing on February 19, 2003. 86a. This petition is being timely filed pursuant to Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

V. REASONS FOR GRANTING THE PETITION

In context and question of law, this case parallels *Verizon*, in which this Court granted certiorari on March 10, 2003. Like *Verizon*, this is an antitrust case challenging an incumbent monopolist in an industry in which deregulation has created competitive markets operating alongside regulated monopolies. *Compare* 2a-6a *with* 305 F.3d at 92-95. Like the plaintiff in *Verizon*, the Midwest Companies allege the defendant used its position as a regulated monopolist to suppress competition in the competitive market. *Id. See also* 305 F.3d at 108 ("The amended complaint alleges that the defendant has monopoly power over a wholesale market in which it sells access to the local loop to telecommunications carriers. It also alleges that the defendant used that power to gain a competitive advantage in a retail market in which telecommunications carriers sell local phone service to consumers."). Like *Verizon*, this case raises the question of whether dismissal was appropriate on antitrust injury and antitrust standing grounds. *Compare* 9a-18a *with* 305 F.3d at 105-08.

This Court granted certiorari in *Verizon* specifically to review the dismissal of the antitrust claims in that case. *See* 123 S. Ct. 1480. This Court's decision in *Verizon* will directly speak to the fundamental issues presented by the similar dismissed claims in this case. If the District Court and the Seventh Circuit had had available the upcoming *Verizon* decision when deciding this case, the impact on the legal analysis unquestionably would have been substantial. In order to harmonize this pending case with the guidance this Court will provide in *Verizon*, the Midwest Companies' petition should be granted, at least for the purpose of a remand for reconsideration in light of the *Verizon* decision when made.

In addition to the points of similarity to the *Verizon* case, this case raises particular issues of recurring concern and substantial importance, as to which the Seventh Circuit's decision deviates from antitrust and pleading principles articulated by this Court. Specifically, the Seventh Circuit's decision overstates the pleading burden to substantiate an overly narrow concept of antitrust injury and standing, and adds a new antitrust injury prerequisite to a tying claim beyond the foreclosure of competition on the merits in the market for the tied product. In order to resolve these important questions of federal antitrust law and civil procedure, the Midwest Companies submit that review by this Court is warranted.

A. The Seventh Circuit Improperly Held Antitrust Injury and Standing Must Be Pleaded with Particularity

While offering the disclaimer that "antitrust plaintiffs need not plead to a heightened level of particularity" (9a), the Seventh Circuit went on to apply an excessively demanding

pleading standard with respect to antitrust injury and antitrust standing. The opinion below clearly stated that antitrust plaintiffs must specifically plead antitrust injury and antitrust standing to survive a motion to dismiss: "the 'short and plain statement' of an antitrust claim must demonstrate 'antitrust injury' and 'antitrust standing.'" 9a. *See also* 10a ("For Services to properly plead an antitrust suit under §4 of the Clayton Act, it is required to show that it has 'antitrust standing,' *i.e.*, that its claimed injuries 'reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation.'") (*quoting Brunswick*, 429 U.S. at 489).

This Court has rejected efforts to impose added particularity requirements when pleading specific kinds of claims. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002), the Court explained that the required showing for a prima facie case of employment discrimination under Supreme Court precedent "is an evidentiary standard, not a pleading requirement." The Court reiterated that the simplified notice pleading standard under Fed. R. Civ. P. 8(a) "applies to all civil actions, with limited exceptions." *Id.* at 513. The "exceptions" are defined by rule, in particular the fraud and mistake provisions of Fed. R. Civ. P. 9(b). *Id.* "Expressio unius est exclusio alterius." *Id.* (*quoting Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993)).

An added pleading requirement, special for antitrust cases, demanding that the plaintiff specify the basis for antitrust injury and antitrust standing, is exactly the kind of heightened pleading standard rejected in *Swierkiewicz* and *Leatherman*. The Seventh Circuit cited *Brunswick* (10a, 13a), but failed to note that *Brunswick* addressed antitrust injury in the context of a fully developed record

after trial on the merits and hence did not erect pleading standards for purposes of a motion to dismiss. *See* 429 U.S. at 481-82. As in *Swierkiewicz* and *Leatherman*, the standards expressed in *Brunswick* should not be translated into special pleading principles unique to antitrust cases. *See Brunswick*, 429 U.S. at 489 (expressing holding in terms of what plaintiff must "prove" to recover antitrust damages).

This Court's subsequent decisions on the subject of antitrust injury and antitrust standing, similarly, do not indicate that the factual predicates must be pleaded in detail to avoid dismissal. *See Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990) (interlocutory review of certified question regarding indirect purchasers after grant of partial summary judgment); *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990) (reviewing grant of summary judgment); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (appeal from grant of injunction); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (grant of summary judgment). In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), this Court held an antitrust complaint was properly dismissed, but only because it did not state a substantive antitrust violation and the plaintiff labor union that was neither consumer nor competitor had only indirect interests. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), this Court held an antitrust case was improperly dismissed, and in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Court found a motion to dismiss was properly denied. The Seventh Circuit's holding that antitrust injury and antitrust standing must be pleaded

with particularity is not supported by this Court's jurisprudence.

It is apparent, furthermore, that the Seventh Circuit is prepared to apply the new pleading standard with overly exacting rigor. The Midwest Companies, after all, did plead both harm to competition and harm to themselves. The complaint described the benefits of competition lost to transport-eligible consumers, including the lost availability of local gas storage in a field connected to two pipelines (90a-93a, 103a-104a ¶¶11-12, 14-15, 49), lost access to the release of Indiana Gas's excess reserves of primary firm capacity (99a-101a ¶¶36, 38, 40) and the resulting Hobson's choice between buying capacity bundled with commodity from ProLiance, buying from a marketer that made a bundled purchase from ProLiance or trying to buy the scarce remaining primary firm capacity not controlled by ProLiance at cost prohibitive rates (101a-102a, 105a, 107a-109a ¶¶42, 56, 63, 68). The complaint further described the resulting injuries to the plaintiffs as excluded competitors, including lost revenues associated with the operation of the storage field (90a-92a, 97a, 99a ¶¶11, 14, 30, 35), sales lost to ProLiance or IES due to anticompetitive conduct (96a-97a, 99a-102a ¶¶28-29, 34, 36, 38, 42) and losses arising from the defendants' efforts to remove the competitive threat of the Midwest Companies specifically (95a, 99a, 103a-104a ¶¶24, 34, 49). *See also* 104a-110a ¶¶50, 54, 58, 64, 70, 76.

Despite the clear allegations that the challenged conduct was harmful to the competitive market and to consumer interests, and at the same time financially damaging to the excluded competitors, the Seventh Circuit concluded the Midwest Companies failed sufficiently to allege antitrust injury and standing. 12a-13a. The opinion below has effectively elevated the maxim that the antitrust

laws were enacted for the protection of competition, not competitors, into a new principle that a competitor's business losses caused by antitrust violations do not confer "antitrust" standing. 13a. Such a limitation is contrary to the clear terms and obvious intent of Clayton Act §4, 15 U.S.C. §15, which specifically provides for a right of action to those injured in their *business* by an antitrust violation.

The Seventh Circuit cited *Brunswick* in support of the theory that the transfer of a business is not harmful to competition. 12a-13a. *Brunswick* involved failing bowling centers that stayed in business because they were acquired by the defendant, thereby preserving rather than diminishing competition. *See* 429 U.S. at 479-80, 487-89. Here, ProLiance immediately reduced the number of competitors by assuming the business of two previously competing marketers, neither of which was failing. 100a ¶37. Using resources transferred by the LDCs and subsidized by their captive customer base, ProLiance displaced competition and in a few short years went from being a start-up company to commanding the lion's share of the competitive market. 99a-102a ¶¶36-38, 40, 42. The allegations here are nothing like the circumstances addressed in *Brunswick*. If the Seventh Circuit meant to suggest the transfer of a business can *never* harm competition, the direction of this decision as a precedent conflicts with an established body of antitrust law exemplified by Clayton Act §7, 15 U.S.C. §18, which subjects acquisitions to potential challenge precisely because a business transfer *may* harm competition.

The concept that a regulated monopolist may try to extend its power into unregulated markets is not new. "There is no logical inconsistency between requiring [a public utility] to meet regulatory criteria insofar as it is

exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 (1976) (concerning electric utility and light bulb market). As Justice Stevens noted in his dissenting opinion in *General Motors*, 519 U.S. at 314, on a point not in conflict with the majority decision, "It is not uncommon for a firm with a monopolistic position in one market also to sell a second product in a competitive market." He concluded that the fact an LDC is regulated in sales of bundled gas to captive customers does not justify a special preference in competitive markets such as thermostats, gas furnaces or unbundled gas. *Id.* Certainly, none of the opinions in *General Motors* suggested that LDCs could leverage their monopoly assets to dominate the competitive, unbundled market with antitrust impunity.

This Court recently addressed anticompetitive effects arising from discriminatory access to transportation into energy markets in *New York v. Federal Energy Regulatory Commission*, 122 S. Ct. 1012 (2002). That case concerned FERC's efforts to promote competition through unbundling in the electric industry. 122 S. Ct. at 1016-21. The Court quoted FERC's statement that "market power through control of transmission is the single greatest impediment to competition." *Id.* at 1019. *See also id.* at 1018 ("The utilities' control of transmission facilities gives them the power either to refuse to deliver energy produced by competitors or to deliver competitors' power on terms and conditions less favorable than those they apply to their own transmissions."). The allegations here that ProLiance has misused its control over transportation capacity to exclude competition thus present a rationale of competitive harm that this

Court has recently endorsed. The Court in *New York* specifically alluded to the role of antitrust enforcement as supplementing the regulation of electric utilities. *Id.* at 1018 n.6.

The Seventh Circuit's decision signals that the rhetoric of antitrust injury and antitrust standing is advancing toward a policy against antitrust suits brought by competitors. Especially when applied as a pleading standard, without an evidentiary record, the search for "antitrust" injury and "antitrust" standing begs for a speculative assessment of market dynamics. The screening of lawsuits at the complaint stage in this manner, notably, is not premised on a showing that the alleged antitrust violations did not occur, but rather on a determination that the injured party is not an appropriate plaintiff. Excluded competitors seeking relief for business losses, however, fall squarely within the intended scope of Clayton Act §4, 15 U.S.C. §15, and should not be held to exaggerated pleading barriers when bringing an antitrust action.

B. The Seventh Circuit Has Added a New Element to a Claim of Unlawful Tying

The Seventh Circuit did not question the sufficiency of the allegations supporting each of the elements of an unlawful tying claim under Sherman Act §1, 15 U.S.C. §1. 14a-15a. *Compare* 105a-106a ¶¶56-59 *with Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 461-62 (1992); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 12-17 (1984). Instead, what it found lacking was an additional "antitrust injury" dimension, stating that "failure to realize expected profits due to competition is not an antitrust injury." 14a-15a. The Seventh

Circuit twice suggested that a tying claim needed to be supported by allegations of predatory pricing or the like. 15a.

The premise that a tying claim is properly stated only if an independent pricing violation is also alleged runs counter to this Court's decisions. A tying violation occurs when the sale of the tying product is conditioned on purchase of the tied product, the seller has appreciable economic power in the market for the tying product and a substantial volume of commerce in the market for the tied product is affected. *See Eastman Kodak*, 504 U.S. at 461-62; *Jefferson Parish*, 466 U.S. at 12-17. Those elements are alleged here. 105a-106a ¶¶56-59.

Tying violates the Sherman Act because it forecloses competition in the market for the tied product. *See Jefferson Parish*, 466 U.S. at 12 ("When such 'forcing' is present, competition on the merits in the market for the tied item is restrained and the Sherman Act is violated.") *id.* at 14 ("This impairment could either harm existing competitors or create barriers to entry of new competitors in the market for the tied product."). When ProLiance forces a customer seeking capacity to purchase gas commodity from it as well, competing marketers like Midwest Gas Services are unable to sell gas to that customer for reasons unrelated to price or quality of service. In *Brunswick* terms, such lost sales flow from the unlawful conduct and constitute the type of injury that the prohibition on unlawful tying was intended to prevent. *See* 429 U.S. at 489. A plaintiff injured in that fashion thus has standing to assert a tying claim.

The complaint alleges that ProLiance holds most of the primary firm capacity into the Indiana Gas territory, including the excess reserves needed to ensure highly reliable service to the captive customers of two LDCs. 99a-101a

¶¶36-38, 40. Instead of selling the excess capacity in the release market, ProLiance bundled it with gas commodity and forced transport-eligible consumers seeking reliable capacity to make ProLiance their commodity supplier. 101a-102a, 105a ¶¶42, 56. Using the bundled sales strategy, ProLiance succeeded in capturing a majority of the competitive market. 101a-102a ¶42. If an excluded competitor's losses are not the type of injury for which antitrust relief is available, then the purpose behind Clayton Act §4, 15 U.S.C. §15, to encourage vigilant enforcement of the antitrust laws, will be significantly eroded in tying cases.

VI. CONCLUSION

The energy industry provides essential services to virtually every individual and business in the nation, and is a critical foundation of the national economy. As deregulatory initiatives have progressed in recent years, the relaxation of regulatory oversight has increased the threat of anticompetitive abuses in emerging competitive markets, as illustrated by the California energy crisis and the Enron trading scandals. When incumbent monopolists operate alongside competitive marketers, the antitrust laws serve as an important check against the monopolists' temptation to transfer resources and lend market power to unregulated affiliates active in competitive markets. The development of the law in this area will establish the pattern for business practices throughout the energy industry.

Given the legal, procedural and thematic parallels between this case and *Verizon*, the Midwest Companies respectfully submit that this petition should be granted at least for a remand to permit reconsideration of this case in light of the upcoming decision in *Verizon*. The Midwest

Companies further submit that the important issues of antitrust law and notice pleading raised in this case provide an independent basis for review by this Court.

Respectfully submitted,

TODD A. RICHARDSON
Counsel of Record
JOHN F. WICKES, JR.
LEWIS & KAPPES
1700 One American Square
Indianapolis, Indiana 46282-0003
(317) 639-1210

Counsel for Petitioners

317 F.3d 703

United States Court of Appeals,
Seventh Circuit.

MIDWEST GAS SERVICES, INC. and Midwest Gas Storage, Inc., Plaintiffs-Appellants,
v.
INDIANA GAS COMPANY, INC., Indiana Energy Services, Inc., and ProLiance Energy, LLC, Defendants-Appellees.

No. 01-2727.

Argued Jan. 16, 2002.
Decided Jan. 22, 2003.
Rehearing and Suggestion for Rehearing En Banc Denied Feb. 19, 2003.*

Peter M. King (argued), Canel, Davis & King, Chicago, IL, Todd A. Richardson, Lewis & Kappes, Indianapolis, IN, for Plaintiffs-Appellants.

Stanley C. Fickle (argued), Terri L. Bruksch, Barnes & Thornburg, Indianapolis, IN, Wayne C. Turner, McTurnan & Turner, Indianapolis, IN, Steven M. Sherman, Indianapolis, IN, Edward P. Henneberry (argued), Howrey, Simon, Arnold & White, Washington, DC, for Defendants-Appellees.

Before BAUER, ROVNER, and WILLIAMS, Circuit Judges.

WILLIAMS, Circuit Judge.

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* Judge Ripple did not participate in consideration of this matter.

The plaintiffs in this antitrust action, Midwest Gas Services, Inc. (Services) and Midwest Gas Storage, Inc. (Storage), appeal from the district court's dismissal of their lawsuit. In granting separately filed motions to dismiss defendants Indiana Gas Company, Inc. (IG), Indiana Energy Services, Inc. (IES), and ProLiance Energy, LLC (ProLiance), the district court ruled that the plaintiffs failed to properly show that they had standing to sue under the antitrust laws and had suffered injuries covered by the antitrust laws. For the reasons described below, we affirm the district court in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Indiana Gas, a local natural gas utility, services 50 counties in southern and central Indiana. The natural gas industry is partially deregulated, with companies like Indiana Gas providing traditional public utility services for small customers within their service area. These utilities, called Local Distribution Companies (LDCs), are regulated by the relevant state authority.[1] In Indiana, the state authority is the Indiana Utility Regulatory Commission (IURC), which allows LDCs such as IG to unbundle their distribution charges. This allows large volume customers or "transport eligible customers," including industrial and institutional buyers, to buy their gas and interstate transportation of that gas from the source to its destination on the open market. Gas delivered through

[1] LDCs do not fall under the authority of the Federal Energy Regulatory Commission (FERC) jurisdiction except for those operations that cross state lines.

interstate pipelines for transport-eligible users is brought as far as the connection to IG's distribution network. Indiana Gas, as an LDC, is required to transport the gas from that point to the end user, receiving a fee for this last piece of the transportation puzzle. This is compared to the traditional fee structure used by LDCs for their residential and other small-quantity customers, who pay one bundled rate combining gas and all of the gas transport charges.

The right to transport natural gas within the interstate pipeline system from one point to another on a specific pipeline is "capacity" and may be freely bought and sold by the pipelines, LDCs, transport-eligible end users, or brokers. In addition, capacity can be partitioned using secondary delivery points. For example, a holder of capacity on a particular pipeline from Point A to Point Z (the two primary delivery points) can sell their rights so that one party buys the Point A-to-Point D segment, another acquires the Point G-to-Point Q segment, and a third purchases the Point S-to-Point Z segment, with Points D, G, Q, and S being secondary points where gas is put into or taken out of the pipeline. This means that instead of relying on one pipeline to transport gas from the wellhead to its final destination, a "virtual pipeline" can be constructed by piecing together capacity along different intersecting pipelines to its final destination. Of course, most end users are not willing to take on these logistics, so companies like Services and ProLiance act as brokers who put together supply and transport contracts for their customers.[2] *See generally* FERC Order No. 637, Regulation

[2] "Transport eligible" customers can purchase two types of gas transport services – firm and interruptible. Firm service is the

(Continued on following page)

of Short-Term Natural Gas Transportation Services, Etc., 65 Fed.Reg. 10,155, 10,157-58, 10,185-95 (Feb. 25, 2000); John Decker, Note, *Authorization of Natural Gas Pipeline Construction: Moving Decisions From Regulators to the Marketplace*, 12 VA. ENVTL. L.J. 505, 508 (1993).

An LDC is required to provide guaranteed service for its residential customers and those other small-scale customers who rely on the LDC for bundled gas and gas transport services. To guarantee that it will have enough capacity during times of peak demand (such as the winter heating season), an LDC must purchase capacity in excess of its average needs. It could turn around and sell this excess capacity via short-term contracts just like any other holder of capacity. IG, as an LDC, was required by the IURC to make its excess capacity available to the market on an equal-access basis, where it could be acquired by others intending to use or resell the capacity.

ProLiance was formed in 1996 as a 50/50 joint venture between a sister company of IG, IGC Energy, Inc.,[3] and a wholly-owned subsidiary of a different LDC in Indiana, Central Gas & Coke Utility (CG). ProLiance works with IG and CG to provide all of their gas supplies, purchasing

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guaranteed right to receive a certain volume of gas via a specific pipeline. Interruptible service is the right to receive a certain volume of gas from a pipeline out of the excess capacity the pipeline has available, *i.e.*, the pipeline's surplus capacity left after the pipeline has met the needs of its firm service customers. Interruptible service customers usually have alternative fuel sources for their energy needs, such as fuel oil or coal, while firm capacity customers are able to use natural gas as their exclusive fuel source. This case only involves firm capacity.

[3] Both IGC Energy, Inc. and IG are wholly-owned subsidiaries of Indiana Energy, Inc.

sufficient capacity to serve both IG and CG's requirements. In addition, ProLiance acts as a marketer of gas and gas transportation for transport-eligible end users, selling the surplus capacity it acquires as a result of servicing IG and CG's needs back into the marketplace. Because ProLiance does not provide any public utility functions, ProLiance is not subject to IURC regulations and, therefore, unlike IG and CG, is not required to sell off its surplus capacity to the general marketplace. From 1994-96, before ProLiance was created, IG created a marketing affiliate, IES, which provided similar services in the same manner as ProLiance, but only for IG.

Storage operates a gas storage field in Clay County, Indiana, and is the only independent gas storage field in IG's service area. Storage functions as a kind of gas warehouse, where customers can store gas in preparation for high-demand times, or as a kind of bridge, routing the gas from one pipeline connected into the storage field, through the field, and out a different pipeline. Storage was authorized by FERC to operate the field in 1991. The field was once connected to the Terre Haute Gas Company's distribution system, which was in turn connected to Texas Gas Transmission's (TGT's) interstate pipeline. IG purchased the Terre Haute facilities in 1990. The field is also located close to the Panhandle Eastern Pipeline's interstate pipeline (PEPL), and a connection between the PEPL pipeline and the storage field was completed in 1994.

Services, a marketing affiliate of Storage, saw an opportunity in the storage field's proximity to the TGT and PEPL pipelines. The TGT pipeline transports gas to Indiana from wells on the coast of the Gulf of Mexico, gas that costs more than the PEPL gas from north Texas and Oklahoma. If Storage could connect to the IG/Terre Haute

system, transport-eligible customers in IG's distribution system who had previously purchased high-priced gas from the TGT pipeline could buy cheaper gas from the PEPL pipeline, using the storage field as a shortcut which would eliminate the extra transportation fees that would otherwise make such a choice financially unattractive. Also, Services could market the storage field to customers for gas storage, allowing them to hedge against seasonal upswings in gas prices. The problem with this plan was that Storage's storage field was no longer connected to the Terre Haute/IG system. Though the necessary connections would only have to span thirty feet at one point and a mile at another, Storage needed to negotiate with IG to establish the interconnect between the respective facilities.

After a series of failed negotiations with IG in an attempt to establish the interconnect, the plaintiffs filed a complaint in February 1999 alleging antitrust violations by IG and two state law claims. They then filed an amended complaint which named IES and ProLiance as additional defendants and added a claim of anticompetitive tying. IG moved for judgment on the pleadings, which the district court denied. On a motion for reconsideration, the district court granted IG's motion regarding the tortious interference with prospective economic advantage claim, but otherwise found that the plaintiffs had standing to assert their claims. ProLiance moved to dismiss the claims against it pursuant to Federal Rule of Civil Procedure 12(b)(6), and the district court granted the motion, finding that the plaintiffs failed to establish both antitrust injury and antitrust standing. Acting *sua sponte*, the district court reconsidered IG's motion for judgment on the pleadings and granted the motion on the same grounds as ProLiance's motion. IES then moved for judgment on the

pleadings, and the district court granted IES's motion on the same grounds.

II. ANALYSIS

We review a district court's grant of a Rule 12(b)(6) motion to dismiss and a Rule 12(c) motion for judgment on the pleadings de novo. *See Velasco v. Ill. Dept. of Human Servs.*, 246 F.3d 1010, 1016 (7th Cir.2001). Grants of either motion are proper only if "it appears beyond doubt that the plaintiff cannot prove any facts that would support his claim for relief." *N. Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir.1998); *Gustafson v. Jones*, 117 F.3d 1015, 1017 (7th Cir.1997). In evaluating the motion, we accept all well-pleaded allegations in the complaint as true, drawing all reasonable inferences in favor of the plaintiff. *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir.2000); *Gustafson*, 117 F.3d at 1017.

In its orders granting the defendants' motions to dismiss and for judgment on the pleadings, the district court found that the plaintiffs did not allege injuries sufficient to maintain antitrust claims. Relying on the Sixth Circuit's opinion in *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972 (6th Cir.2000), the district court found that as competitor companies, the plaintiffs could only demonstrate an antitrust injury if their exclusion from the marketplace eliminated a superior competing product or lower-cost alternatives.

Here, the district court concluded, ProLiance competed with Services. Services' revenues from transportation and gas sales were reduced, but it could not demonstrate that it had a superior or cheaper product. Since it believed that Services was a competitor and not a customer of the

defendants, and since Storage was neither a competitor nor consumer of the defendants, the district court concluded that the plaintiffs could not demonstrate that they had standing to bring an antitrust claim. The district court further explained that even if the plaintiffs could demonstrate that they were proper parties to bring an antitrust suit against the defendants, it considered dispositive the Indiana Supreme Court's finding that ProLiance's formation was in the public interest and did not injure competition. *See United States Gypsum, Inc. v. Ind. Gas Co., Inc.*, 735 N.E.2d 790, 803-04 (Ind.2000). Since, according to *United States Gypsum*, ProLiance did not injure competition, the district court concluded that the plaintiffs could not establish that they had suffered an antitrust injury, making dismissal of their claims appropriate.

The district court's reliance on *Indeck* is misplaced because the plaintiffs here allege more and different allegations than those in that Sixth Circuit case. In *Indeck*, the plaintiff energy supplier was rebuffed by Consumers Energy when Consumers required additional energy to service its accounts. Instead, Consumers purchased power from one of its affiliates. Indeck claimed that it lost business to a competitor that was affiliated with the customer, but not "that a less-than-arm's-length transaction destroyed or damaged the competitive environment in power generation." *Indeck*, 250 F.3d at 978. Here, the plaintiffs allege antitrust claims not only based on the affiliation between the defendants, like Indeck, but also that certain business practices by and between the defendants injure competition.

The district court here, relying on the reasoning of *Indeck*, found that neither plaintiff was able to show that

it was a proper plaintiff to bring an antitrust claim. We keep in mind that to survive a motion to dismiss or judgment on the pleadings, a plaintiff need not include the particulars of his claim; only a "short and plain statement" is needed. fed. R. Civ. P. 8(a)(2); *see MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 62 F.3d 967, 976 (7th Cir.1995). This is also true for antitrust cases. Though the "short and plain statement" of an antitrust claim must demonstrate "antitrust injury" and "antitrust standing," antitrust plaintiffs need not plead to a heightened level of particularity. *See Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); *S. Austin Coalition Cmty. Council v. SBC Communications Inc.*, 274 F.3d 1168, 1171 (7th Cir.2001); *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir.1994). While we agree with the district court that the plaintiffs do not have standing to assert certain antitrust claims, for the same reasons that the Sixth Circuit found in *Indeck*, we also find that they have shown their ability to assert other claims. We address these allegations in turn.

A. Conspiracy to Restrain Trade

The plaintiffs' conspiracy claim alleges that IG and PEPL conspired to prevent Storage from existing as a viable gas storage facility by refusing to allow it physical access to their facilities, which frustrated Services' contracts with customers in IG's service area. The amended complaint describes communications between PEPL and IG officials who apparently discussed ways to prevent Storage from both establishing an interconnect with the IG distribution system and being designated a secondary receipt point for gas transported by PEPL. The frustration

of these efforts, according to Services, prevented it from selling gas services to customers who would have used Storage's storage field and its interconnects with the IG distribution system and PEPL's pipeline.

For Services to properly plead an antitrust suit under § 4 of the Clayton Act, it is required to show that it has "antitrust standing," *i.e.*, that its claimed injuries "reflect the anticompetitive effect of either the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977); *see also Allied-Signal, Inc. v. B.F. Goodrich Co.*, 183 F.3d 568, 575 (7th Cir.1999). Whether a plaintiff has antitrust standing depends on offense-specific factors, including: "(1) [t]he causal connection between the alleged anti-trust violation and the harm to the plaintiff; (2) [i]mproper motive; (3) [w]hether the injury was of a type that Congress sought to redress with the antitrust laws; (4) [t]he directness between the injury and the market restraint; (5) [t]he speculative nature of the damages; (6) [t]he risk of duplicate recoveries or complex damages apportionment." *Sanner v. Bd. of Trade of City of Chicago*, 62 F.3d 918, 927 (7th Cir.1995) (listing factors drawn from *Assoc. Gen. Contractors of Cal. Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535-36, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983)). Of these factors, we need only be concerned here with the directness between Services' claimed injury and the alleged market restraint.

Services' claimed injury did not stem directly from the purported IG-PEPL conspiracy, but rather the alleged conspiracy's effect on Storage, whose position as a bridge between the TGT and PEPL pipelines was necessary for Services to create the arbitrage opportunities for its

customers. Services is not alleging that it was completely prevented from supplying its customers, but that it could not promote and take advantage of the opportunity that an IG-Storage connection would have provided. Services' injury, therefore, is derivative to that of Storage, which is the party directly injured by the alleged conspiracy. Since Services cannot demonstrate that it has suffered an antitrust injury directly resulting from the conspiracy, the district court properly dismissed Services' conspiracy claim.

The defendants argue that Storage has pleaded itself out of a claim due to the amended complaint's description of the relevant market as "the market for transporting and selling gas to end users that are allowed by tariff to receive transported natural gas in the 50 counties in north central, central and southern Indiana in which Indiana Gas is an LDC." The defendants point out that because Storage is not permitted under its FERC operating certificate to sell natural gas or gas transport to end users, it cannot be a participant in the market which it claims is injured by the defendants' actions.

While it is true that Storage's operating certificate only allows it to construct and operate the storage field, not to sell or market natural gas, FERC Order Issuing Certificate, Docket No. CP90-454-000, at 13 (April 30, 1991), storing natural gas is integral to its transportation. Just as a pipeline that bridges two other pipelines is part of the transportation network that the appellants claim as their market, so is a storage field that is connected to different pipelines. FERC recognized this when it described "transportation" to include "*storage*, exchange, backhaul, displacement, or other methods of transportation" in its regulations concerning natural gas transportation. 18

C.F.R. § 284.1 (emphasis added). We therefore find that Storage is a participant in the relevant market and for that reason is not barred from asserting its claims.

Storage further alleges that IG, ProLiance, and PEPL conspired to isolate Storage by refusing it access to their transportation facilities, thereby preventing Storage from being able to deliver gas to end users. Because Storage is directly affected by this alleged conspiracy, and Services is not, Storage is the proper plaintiff to bring this claim. To properly allege a conspiracy under § 1 of the Sherman Act, a plaintiff need only allege that the conspiracy unreasonably restrained competition in a relevant market. *See MCM Partners*, 62 F.3d at 976. Since Storage has described such a conspiracy and is a participant in the claimed market, we find that the district court erred when dismissing this claim.

B. ProLiance as an Illegal Combination

The plaintiffs' second § 1 claim alleges that the formation of ProLiance by Indiana Gas and Central Gas is a combination that acts as an unreasonable restraint of trade. ProLiance is a 50/50 joint venture that combined IG and CG's gas marketing and sales arms; it does not transport gas itself, nor does it involve IG or CG's other regulated utility functions. As described by the plaintiffs in the amended complaint, ProLiance "competes directly with other gas marketers, such as Services. ProLiance markets to the large commercial and industrial customers Services contracted with and hoped to contract with." However, the amended complaint does not allege that ProLiance's market dominance came from combining the market shares of these two offices. Transfer of a business from one

company to another, without alleging an effect on competition as a result of the combination, cannot be an antitrust violation, because "the antitrust laws . . . were enacted for 'the protection of competition, not competitors.'" *Brunswick*, 429 U.S. at 488, 97 S.Ct. 690 (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)).

Plaintiffs claim that as a result of ProLiance's formation, they have been unable to gain enough customers to profit from the regulations that allow brokers to sell gas and gas transportation to transport-eligible customers. However, ProLiance has simply taken on the role that IG's marketing department assumed earlier, though with greater success. The transfer of a competitor's business to a different competitor, one who is able to more effectively compete in the marketplace, is not an antitrust violation. What the plaintiffs describe in their complaint regarding the formation of ProLiance is no different than the situation in *Brunswick*, where a number of failing businesses were acquired by a large corporation that was able to place them on a solid footing and have them compete effectively in the marketplace. *Brunswick*, 429 U.S. at 488, 97 S.Ct. 690. While plaintiffs may be able to show that ProLiance acquired advantages in the gas transportation market based on dealings with Indiana Gas and CG, "[a] private antitrust plaintiff . . . does not acquire standing merely by showing that he was injured by the defendant's conduct." *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 597 (7th Cir.1995); *see also Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 115-17, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986). Because the plaintiffs could not demonstrate that they had standing, the district court correctly dismissed this § 1 claim.

The defendants also point to the IURC's approval of ProLiance's formation, a decision affirmed by the Indiana Supreme Court in *United States Gypsum*. They claim that as a result of this decision, ProLiance's formation has been immunized via the state action doctrine (though ProLiance, as a non-regulated entity, is not strictly under the jurisdiction of the IURC). While it is true that ProLiance's formation was found to be "in the public interest," plaintiffs' failure to adequately plead a viable § 1 claim regarding ProLiance's formation means that we need not address this affirmative defense.

C. Tying

ProLiance allegedly has been illegally tying its sale of natural gas to its sale of gas transport services, *i.e.*, customers have been told that in order to purchase gas transport, they must purchase the gas itself from ProLiance. When evaluating a tying claim, "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984).

An underlying question regarding this tying claim is whether the plaintiffs have suffered an antitrust injury as a result. Suits cannot be brought under § 4 of the Clayton Act unless "a private party is *adversely* affected by an anticompetitive aspect of the defendant's conduct." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (citing *Brunswick*, 429

U.S. at 487, 97 S.Ct. 690) (emphasis in original). Neither plaintiff claims that the prices that ProLiance charged for the gas itself or its transportation were predatory, or that ProLiance somehow injured its customers by charging excessive prices for either gas transportation or gas. Rather, the plaintiffs claim injury because they "have been unable to profit from Rates 45, 60 and 70, or to otherwise compete with ProLiance and IES in the sale of natural gas and its transportation. Plaintiffs have lost the transportation fees and marketing profits they otherwise would have earned had they been permitted to compete in the relevant market." While they may have lost profits as a result of ProLiance's sales, failure to realize expected profits due to competition is not an antitrust injury, because "a plaintiff can only recover if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *Atl. Richfield*, 495 U.S. at 344, 110 S.Ct. 1884. The plaintiffs' claim is, in essence, that ProLiance is able to use its large market share to purchase natural gas in bulk, and sell that gas, along with the gas transportation it controls, to customers at a lower margin than its competitors because of its high sales volumes. That the plaintiffs' losses stem from this behavior and not behavior that is anticompetitive, *e.g.*, predatory pricing, means that they cannot make a tying claim against ProLiance that can withstand a motion to dismiss, since "the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws." *Cargill*, 479 U.S. at 116, 107 S.Ct. 484; *see also Atl. Richfield*, 495 U.S. at 340-41, 110 S.Ct. 1884; *Jefferson Parish*, 466 U.S. at 14, 104 S.Ct. 1551.

D. Monopoly Maintenance and Attempted Monopolization

The plaintiffs' § 2 claims describe IG and ProLiance (and IES, as ProLiance's predecessor) as maintaining, or in the alternative, attempting to acquire, a monopoly in the distribution of natural gas and its transportation to transport-eligible customers in IG's service area. These claims take two forms: first, that IG and ProLiance used IG's monopoly over local distribution to leverage increased sales of natural gas and transportation to customers in the relevant market, and second, that IG has denied the plaintiffs access to an essential facility, *i.e.*, an interconnect with IG's distribution system. These claims are brought, in a belt-and-suspenders approach, as both actual and attempted monopolization claims. It is not necessary to determine whether the monopolies the plaintiffs complain of are actual or not, since either way their amended complaint fails to adequately make out the claims.

The plaintiffs' monopoly leveraging claim is essentially their tying claim with a different label. This is problematic because a § 2 claim can only accuse one firm of being a monopolist, but the plaintiffs' monopoly maintenance claim involves both IG's monopoly over the sale of gas and its distribution within its territory via ProLiance. Because IG ceded its gas marketing functions to ProLiance as part of the joint venture, the plaintiffs claim that IG has monopoly control over something in which it is not a market participant. The plaintiffs claim that ProLiance is functionally under the control of IG, but as we explained when discussing the plaintiffs' § 1 claims concerning ProLiance's formation, ProLiance is an entity separate and distinct from IG, so the plaintiffs' leveraging claims should be considered under § 1 of the Sherman Act, not § 2. In

any event, as we concluded regarding plaintiffs' tying claims, this claim fails because the plaintiffs are unable to establish that they have suffered an antitrust injury, so the district court properly dismissed this claim.

The essential facilities claim centers on the proposed interconnect between Storage's field and the IG distribution network, which the plaintiffs describe as necessary for the storage field to service clients within IG's territory. An essential facilities claim requires that the plaintiff allege: (1) that Indiana Gas is a monopolist and controls an essential facility; (2) that the facility could have been provided to Storage by Indiana Gas; (3) that Indiana Gas denied access to the essential facility; and (4) that a duplicate facility could not reasonably be provided. *See MCI Communications Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1133 (7th Cir.1983). The plaintiffs describe the interconnect between the storage field and the IG distribution network as the facility at issue, but "[t]o be an essential facility, . . . a facility must be essential," and the interconnect is not. *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir.1995). According to the amended complaint, the storage field is already connected to interstate gas pipelines, including those of PEPL, TGT and a third company called ANR. Just as gas can be routed into the storage field via these three pipelines, so can gas be routed *out* of the field via these pipelines, and from there to IG's distribution network through the pipeline's own interconnect.

Though the plaintiffs say, probably correctly, that "[a] direct interconnect to the Indiana Gas pipeline from Storage's field would have been the most economical way to do this," the most economical route is not an essential facility when other routes are available. *See Endsley v.*

City of Chicago, 230 F.3d 276, 283 (7th Cir.2000) (control of the Chicago Skyway does not give its owner a monopoly over road transport between Chicago and Indiana when other freeway and surface street routes are available). Therefore, the § 2 claims in the amended complaint were properly dismissed by the district court.

The plaintiffs also allege in the amended complaint that PEPL and IG conspired to prevent Storage from being able to serve as an alternative route or shortcut between pipeline systems by frustrating Storage's attempt to have the field designated as a secondary delivery point on PEPL's pipeline. This is not a § 2 claim, and is addressed above in our discussion of the plaintiffs' § 1 conspiracy claim.

E. State Law Claims

The plaintiffs allege, pursuant to Indiana state law, that the defendants committed the tort of interference with prospective economic advantage and violated the Indiana Antitrust Act, Ind.Code §§ 24-1-2-1, *et seq.* As the district court and both sides recognize, the Indiana Antitrust Act follows the same standards as the Sherman Act. *See Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 725 n. 31 (7th Cir.1979); *Citizens Nat'l Bank of Grant Cty. v. First Nat'l Bank in Marion*, 165 Ind.App. 116, 331 N.E.2d 471, 478 n. 5 (1975). Based on our conclusions regarding the plaintiffs' federal antitrust claims, we find that the district court improperly dismissed those state antitrust claims which relate to the federal claims that we have found were adequately pleaded, *i.e*, Storage's § 1 conspiracy claim.

The plaintiffs' other state law claim is for tortious interference with a prospective economic advantage.

Under Indiana law, this claim requires: (1) the existence of a business relationship, (2) the defendant's knowledge of the existence of that relationship, (3) the defendant's intentional interference in that relationship, (4) the absence of any justification, and (5) damages. *See Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1252 (7th Cir.1994); *see also Flintridge Station Assocs. v. Am. Fletcher Mortg. Co.*, 761 F.2d 434, 441 (7th Cir.1985); *Butts v. Oce-USA, Inc.*, 9 F.Supp.2d 1007, 1012 (S.D.Ind.1998); *Furno v. Citizens Ins. Co. of Am.*, 590 N.E.2d 1137, 1140 (Ind.Ct. App.1992).

The district court, in its January 8, 2001, entry on Indiana Gas's Motion to Correct Errors in Judgment, found that IG was a party to the business relationship that was disrupted and dismissed the claim. However, when judging the sufficiency of a complaint on a motion to dismiss, a claim should be dismissed only "if it appears beyond doubt that the plaintiff cannot prove any set of facts that would entitle it to relief." *Tobin for Governor v. Ill. State Bd. of Elections*, 268 F.3d 517, 522 (7th Cir.2001); *see also Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

It is just as plausible that the business relationship allegedly disrupted was Services's relationship with its end-use customers located in IG's service area. Services was required to notify IG that it had established a gas supply contract with the end users. According to the amended complaint, IG then contacted those customers itself and informed them of ProLiance's services. If these contacts resulted in customers backing out of their relationships with Services and working instead with ProLiance, that would establish a claim of interference with prospective economic advantage sufficient to survive a

motion to dismiss. Since the set of facts described above is consistent with the allegations in the complaint and would entitle Services to relief if true, we find that the district court improperly dismissed this claim regarding Services. *See Lanigan v. Village of East Hazel Crest, Ill.*, 110 F.3d 467, 479 (7th Cir.1997).

III. CONCLUSION

For the foregoing reasons, we AFFIRM the decision of the district court in part, REVERSE in part, and REMAND for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST GAS SERVICES, INC., and MIDWEST GAS STORAGE,	)	
Plaintiffs,	)	IP 99-0690-C-Y/G
vs.	)	
INDIANA GAS COMPANY, INC., INDIANA ENERGY SERVICES, INC., and PROLIANCE ENERGY, LLC,	)	
Defendants.	)	

ENTRY ON PLAINTIFFS' RENEWED MOTION FOR CERTIFICATION OF FINAL JUDGMENTS FOR IMMEDIATE APPEAL PURSUANT TO FED. R. CIV. P. 54(b)

I. Introduction

This matter comes before the court on plaintiffs Midwest Gas Services, Inc.'s ("Midwest Gas") and Midwest Gas Storage, Inc.'s ("Midwest Storage") (collectively, "Midwest Companies" or "plaintiffs") renewed motion for certification of final judgments for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b). Specifically, the Midwest Companies request this court to make an express determination that "there is no just reason for delay" and to certify the two final judgments, dated April 20, 2001 in favor of defendants Indiana Gas Company, Inc. ("Indiana Gas") and ProLiance Energy, LLC ("ProLiance") (collectively, "defendants"), for immediate appeal. After

reviewing this motion in light of the previous entries entered by this court, the court now finds that plaintiffs' motion is **granted.**

II. Discussion

On May 29, 2001, this court denied as moot plaintiffs' motion for *nunc pro tunc* determination of no just reason for delay, and for certification of final judgments for immediate appeal pursuant to Rule 54(b) on the basis that Indiana Energy Services, Inc.'s motion for judgment on the pleadings was also granted on May 29, 2001, leaving no defendants in this matter.

Plaintiffs rightly point out, however, that the court has not addressed Indiana Gas's pending counterclaims. After reviewing the Midwest Companies' claims and Indiana Gas's counterclaims, the court now finds that the subject matter of the dismissed claims and the pending counterclaims are sufficiently distinct that there is no just reason for delaying appeal. Accordingly, the Midwest Companies' renewed motion for certification of final judgments for immediate appeal is **granted**.

III. Conclusion

It is therefore ordered, adjudged, and decreed that the Plaintiffs' renewed motion for certification of final judgments for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b) is hereby **granted**, that the court hereby determines that there is no just reason for delay with respect to the final judgment entered on May 29, 2001, and that the court certifies said judgment for immediate appeal pursuant to Rule 54(b). FED. R. CIV. P.

It is so ordered this 22nd day of June 2001.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST GAS SERVICES, INC., and MIDWEST GAS STORAGE,	)	
Plaintiffs,	)	IP 99-0690-C-Y/G
vs.	)	
INDIANA GAS COMPANY, INC., INDIANA ENERGY SERVICES, INC., and PROLIANCE ENERGY, LLC,	)	
Defendants.	)	

ENTRY ON
PLAINTIFFS' MOTION TO RECONSIDER
DISMISSAL ORDERS AND TO
GRANT RELIEF FROM JUDGMENTS

I. Introduction

This matter comes now before the court on plaintiffs Midwest Gas Services, Inc.'s ("Midwest Gas") and Midwest Gas Storage, Inc.'s ("Midwest Storage") (collectively, "Midwest Companies" or "plaintiffs") motion to reconsider dismissal orders of April 20, 2001 and to grant relief from judgments. After reviewing the motions, the parties' arguments, the law and facts of the case, the court finds that plaintiffs' motion to reconsider **denied.**

II. Procedural Status Facts

1. This action was originally brought by the Midwest Companies against only defendant Indiana Gas

Company, Inc. ("Indiana Gas") on February 2, 1999.

2. Indiana Gas filed a motion for judgment on the pleadings a year later on February 4, 2000.

3. While that motion was being briefed, the Midwest Companies filed their first amended complaint on March 8, 2000, adding four additional defendants including ProLiance Energy, LLC ("ProLiance") and Indiana Energy Services, Inc. ("IES").

4. By agreement of the parties, two of the new defendants were voluntarily dismissed on April 24, 2000.

5. IES appeared and filed an answer on May 3, 2000.

6. In that same month, ProLiance filed a motion to dismiss on May 19, 2000.

7. Initially, the court denied Indiana Gas's motion for judgment on the pleadings in an entry dated September 29, 2000.

8. Indiana Gas then filed a motion to correct errors on October 26, 2000.

9. The court ruled on Indiana Gas's motion to correct errors on January 8, 2001, which among other things, dismissed count VI of the first amended complaint against Indiana Gas only.

10. After receiving ProLiance's second supplemental submission of authority, the court granted ProLiance's motion to dismiss in an entry dated April 20, 2001. The court indicated in the April 20, 2001 entry that it was persuaded by the supplemental authority – *Indeck Energy Services, Inc. v. Consumers Energy Co.*, 234 F.3d 1268, 2000 WL 1529802 (6th Cir. 2000) (per curiam) – and found

that the Midwest Companies lacked the requisite antitrust injury required to establish antitrust standing. Furthermore, the finding of the Indiana Utility Regulatory Commission ("IURC") that the creation and operation of ProLiance did not affect the relevant market was affirmed by the Indiana Supreme Court, indicating that no antitrust injury occurred in the relevant market. *United States Gypsum, Inc. et al. v. Indiana Gas Co.*, 735 N.E.2d 790 (Ind. 2000), *vacating United States Gypsum, Inc. et al. v. Indiana Gas Co.*, No. 93A02-9710-EX-667 (Ind. Ct. App. Oct 8, 1998) and *aff'g Petition by Ratepayers of Indiana Gas Co. et al.*, No. 40437 (IURC Sept. 12, 1997) ("IURC Sept. 12, 1997 Decision").

11. On the same day, in light of ProLiance's supplemental submission in conjunction with the Indiana Supreme Court's decision in *Gypsum*, the court entered a *sua sponte* entry on Indiana Gas's motion to correct errors, which resulted in the court granting Indiana Gas's motion for judgment on the pleadings.

12. The two April 20, 2001 decisions were not final appealable judgments because neither entry granted relief to the third defendant, IES.

13. The Midwest Companies then filed a motion for a *nunc pro tunc* determination of no just reason for delay and for certification of final judgments for immediate appeal pursuant to Rule 54(b) as well as the motion to reconsider dismissal orders and grant relief from judgments, which is the focus of this entry, on Friday, May 11, 2001.

14. On Monday, May 11, 2001, IES filed its own motion for judgment on the pleadings, which this court granted May 29, 2001 (docket # 218). The

court granted IES's motion for a judgment on the pleadings for the same reasons set forth in both of the court's April 20, 2001 entries.

15. Since the court granted IES's motion for judgment on the pleadings, the court ruled that the Midwest Companies' motion for a *nunc pro tunc* determination was denied as moot in a separate entry dated May 29, 2001 (docket #219). In addition, on May 29, 2001, the court ruled that the Midwest Companies' motion to set plaintiffs' pending motions for a hearing was denied as moot. (docket #220).

III. Discussion: Motion to Reconsider Dismissal

The Midwest Companies move the court to reconsider its April 20, 2001 dismissal orders and its May 29, 2000 entry granting IES's judgment on the pleadings.[1] To support their motion, the Midwest Companies set forth two premises that they submit are in error.

The court will treat each premise separately below.

1. Midwest Companies' First Premise

First, the Midwest Companies assert that the court erroneously relied on the IURC's 1997 determination. According to the Midwest Companies, the IURC specifically contemplated that its initial assessment would be

[1] Since the court granted IES's motion for judgment on the pleadings for the same reasons set forth in the two April 20, 2001 entries, the court is treating the present motion to reconsider the April 20, 2001 Entries as also directed towards the entry on IES's motion for judgment on the pleadings.

subject to reconsideration in the future, and on April 30, 2001, ten days after this court's dismissal orders were issued in this case, the IURC issued a decision indicating that it would revisit the initial approval of the ProLiance arrangement. *Petition of Indiana Gas Co., Inc., for Approval of Changes in Its Gas Cost Adjustment & Petition of the Bd. of Dirs. for the Util. Dep't of the City of Indianapolis*, Nos. 37394GC50S1, 37399GC50S1[2] (IURC Apr. 30 2001) ("IURC Apr. 30, 2001 Decision") (Plaintiffs' Ex. A).

The court finds that while the IURC states in its April 30, 2001 decision that it "did not conclude [in its Sept. 12, 1997] that the marketing and other gas services provided by ProLiance as an affiliate of Indiana Gas and Citizens Gas would be free from scrutiny", (IURC Apr. 30, 2001 Entry, at 2), the April 30, 2001 decision does not alter any findings made in its original September 12, 1999 decision. *Id.*; *see also Petition by Ratepayers of Indiana Gas Co. et al.*, No. 40437 (IURC Sept. 12, 1997). Thus, the original IURC findings, which were affirmed by the Indiana Supreme Court, still stand as the current law. *United States Gypsum, Inc. et al. v. Indiana Gas Co.*, 735 N.E.2d 790 (Ind. 2000).

The court, therefore, finds no reason to reconsider its April 20, 2001 entries, which dismissed defendants ProLiance and Indiana Gas on the basis of the Indiana Supreme

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[2] The IURC's September 12, 1997 decision (Cause No. 40437) is considered a subdocket to this case; however, in its April 30, 2001 decision the IURC states that "for the purposes of this proceeding the presiding officers have modified the Cause Nos., referenced in the caption, and the revised Cause Nos. should be utilized by the parties in this proceeding." (IURC Apr. 30, 2001 Decision, at 1).

Court's findings in *Gypsum*. Accordingly, the Midwest Companies' motion to reconsider is **denied** as to its first premise.

2. Midwest Companies' Second Premise

Second, the Midwest Companies assert that the court overlooked the allegations that the defendants' conduct was harmful to the competitive market as a whole, and, therefore, erroneously found that plaintiffs did not establish an antitrust injury. After a thorough review of the Midwest Companies' complaint, the court finds that they did not allege an injury to the market but only injuries to themselves as competitors. However, even if the Midwest Companies had alleged that the defendants' conduct was harmful to the competitive market as a whole, the court finds that the current law and Indiana Surpreme Court's factual findings would undercut such an allegation.

The Indiana Supreme Court affirmed the IURC's findings that ProLiance has not detrimentally affected the gas transportation market: no anti-competitive price patterns have emerged and the affected markets are "as robust after the formation of ProLiance as they were prior to its formation." *Gypsum*, 735 F.2d at 804. (quoting IURC Sept. 27, 1997 Opinion, at 54); *see also* IURC Sept 27, 1997 Opinion, at 20-29; 40-42, 45, 55-58 (examining public interest and market affects).

Thus, the court concludes that the IURC's findings, affirmed by the Indiana Supreme Court, indicate that there is no factual basis for an allegation of marketplace injury. At present, the IURC has published no findings that directly contradict its original findings that ProLiance has not adversely affected the relevant market. The court,

therefore, finds that the Midwest Companies' motion to reconsider is also **denied** as to its second premise.

III. Conclusion

For the reasons set forth above, the court finds that the plaintiffs' motion to reconsider dismissal orders and to grant relief from judgment is **denied**.

It is so ordered this 22nd day of June 2001.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST GAS SERVICES, INC., and MIDWEST GAS STORAGE,	)	
Plaintiffs,	)	
vs.	)	IP 99-0690-C-Y/G
INDIANA GAS COMPANY, INC., INDIANA ENERGY SERVICES, INC., and PROLIANCE ENERGY, LLC,	)	
Defendants.	)	

FINAL JUDGMENT

The court, having this day made its entry, now enters final judgment in favor of defendant Indiana Energy Services, Inc. ("IES"). **It is now therefore adjudged and decreed** that the motions for judgment on the pleadings of IES and Indiana Gas Co., Inc. as well as the motion to dismiss of ProLiance Energy, LLC are **granted** and that judgment is now entered for those defendants and against the plaintiffs.

It is so ordered this 29 day of May 2001.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST GAS SERVICES, INC., and MIDWEST GAS STORAGE,	)	
Plaintiffs,	)	
vs.	)	IP 99-0690-C-Y/G
INDIANA GAS COMPANY, INC., INDIANA ENERGY SERVICES, INC., and PROLIANCE ENERGY, LLC,	)	
Defendants.	)	

ENTRY ON
DEFENDANT INDIANA ENERGY SERVICES'
MOTION FOR JUDGMENT ON THE PLEADINGS

I. INTRODUCTION

This matter now comes before the court on Defendant Indiana Energy Services, Inc.'s (IES) motion for judgment on the pleadings. After reviewing the motion and this court's previous entries on Defendant Indiana Gas Company, Inc.'s ("Indiana Gas") motion for judgment on the pleadings[1] and Defendant ProLiance Energy, LLC's

[1] Entry is entitled "Sua Sponte Entry on Indiana Gas' Motion to Correct Errors" (April 20, 2001) (docket # 198).

("ProLiance") motion to dismiss[2], the court finds that IES's motion for judgment on the pleadings shall be **granted**.

II. JURISDICTION

This court exercises jurisdiction over the federal claims pursuant to 28 U.S.C. § 1337 and the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and this court exercises supplemental jurisdiction over all state claims pursuant to 28 U.S.C. § 1367.

III. FACTS

1. On February 2, 1999, Plaintiffs Midwest Gas Services, Inc. ("Midwest Gas") and Midwest Gas Storage, Inc. ("Midwest Storage") (collectively, the Midwest Companies") filed their complaint against Indiana Gas only. (Defendant IES's Motion for Judgment on the pleadings ("IES Motion"), at ¶ 1).

2. On February 4, 2000, Indiana Gas filed a motion for judgment on the pleadings, followed by a memorandum in support thereof filed on March 2, 2000. Indiana Gas' motion asserted, among other things, that the Midwest Companies lack antitrust injury and antitrust standing. (IES Motion, at ¶ 2).

3. On March 8, 2000, the Midwest Companies filed a first amended complaint, which added IES as a

[2] Entry is entitled "Entry on Defendant ProLiance Energy's Motion to Dismiss Plaintiffs' First Amended Complaint" (April 20, 2001) (docket # 196).

party to this litigation. IES was the predecessor marketing affiliate of Indiana Gas. The First Amended Complaint also added Indiana Energy, Inc., IGC Energy, Inc., and ProLiance. (IES Motion, at ¶ 3).

4. On April 24, 2000, following informal discussions with Indiana Gas' counsel, the Midwest Companies filed a notice of voluntary dismissal, dismissing Indiana Energy, Inc. and IGC Energy, Inc. but not ProLiance or IES. (IES Motion, at ¶ 4).

5. On May 3, 2000, IES filed its answer to the Midwest Companies' first amended complaint, asserting, among other defenses, that the Midwest Companies lack antitrust injury and antitrust standing. (IES Motion, at ¶ 5).

6. On May 19, 2000, ProLiance filed a motion to dismiss the Midwest Companies' first amended complaint, asserting, among other defenses, that the Midwest Companies lack antitrust injury and antitrust standing. (IES Motion, at ¶ 6).

7. On September 29, 2000, the court denied Indiana Gas' motion for judgment on the pleadings. In response, on October 26, 2000, Indiana Gas filed a motion to correct errors, which noted among other things, that the court's September 29, 2000 entry included citations to *United States Gypsum, Inc. v. Indiana Gas Co.,* 705 N.E.2d 1017 (Ind. Ct. App. 1998) without indication that the Indiana Supreme Court granted transfer and vacated the court of appeals decision. *United States Gypsum, Inc. v. Indiana Gas Co., Inc,* 735 N.E.2d 790 (Ind. 2000). On January 8, 2001, the court granted Indiana Gas' motion to correct errors, dismissing Count VI of the Midwest Companies' first

amended complaint as it applied to Indiana Gas. (IES Motion, at ¶ 7).

8. On April 20, 2001, the court entered an order granting ProLiance's motion to dismiss, finding that based on supplemental submissions not previously before the court, the Midwest Companies lack antitrust standing to assert their federal and state antitrust claims and had not adequately alleged an actionable antitrust injury. (IES Motion, at ¶ 8).

9. Also on April 20, 2001, the court entered its sua sponte entry on Indiana Gas' motion to correct errors, which granted Indiana Gas' motion for judgment on the pleadings finding that the Midwest Companies lack antitrust injury and standing for both their federal and state antitrust claims against Indiana Gas. Accordingly, the remaining counts of the Midwest Companies' first amended complaint were dismissed as they applied to Indiana Gas. (IES Motion, at ¶ 9).

IV. Discussion

IES brings its motion for judgment on the pleadings, arguing that although it had not formally joined Indiana Gas' motion for judgment on the pleadings, as it was filed before IES was named as a party in this action, the factual and legal findings of this court's April 20, 2001 sua sponte entry on Indiana Gas' motion for judgment on the pleadings/motion to correct errors applies with equal force to IES since IES was the predecessor to ProLiance as Indiana Gas' marketer. The court agrees.

In both of its April 20, 2001 entries, this court concluded that based upon the findings of the Indiana

Supreme Court in *United States Gypsum,* the IURC's affirmed findings and ProLiance's supplemental submission of *Indeck Energy Serv., Inc. v. Consumers Energy Co.,* 234 F.3d 1268, 2000 WL 1529802 (6th Cir. 2000) (per curiam), the relevant market incurred no antitrust injury. Since there is no antitrust injury to the relevant market, there can be no viable antitrust injury to any of the defendants, including IES. Accordingly, IES should also be dismissed from this matter. IES's motion for judgment on the pleadings is **granted**.

V. CONCLUSION

As set forth in this court's April 20, 2001 entries on Indiana Gas' motion for judgment on the pleadings/motion to correct errors and ProLiance's motion to dismiss, plaintiffs Midwest storage and Midwest Services lack antitrust standing for both their federal and state antitrust claims because they have failed to demonstrate the requisite antitrust injury. Consequently, like the motions of co-defendants Indiana Gas and ProLiance, defendant IES's motion for judgment on the pleadings is hereby **granted** as to all Counts set forth in the Midwest Companies' first amended complaint. Defendant IES is no longer a party to this matter.

It is so ordered this 29 day of May 2001.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST GAS SERVICES, INC., and MIDWEST GAS STORAGE,	)	
Plaintiffs,	)	IP 99-0690-C-Y/G
vs.	)	
INDIANA GAS COMPANY, INC., INDIANA ENERGY SERVICES, INC., and PROLIANCE ENERGY, LLC,	)	
Defendants.	)	

ENTRY ON DEFENDANT PROLIANCE ENERGY'S MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

I. INTRODUCTION

Plaintiffs Midwest Gas Services ("Midwest Services") and Midwest Gas Storage ("Midwest Storage") (collectively, "Midwest companies") filed their initial Complaint against Indiana Gas Company ("Indiana Gas") only. Thereafter, plaintiffs filed their First Amended Complaint[1]

[1] Plaintiffs First Amended Complaint contains seven Counts:

(Plaintiffs' First Amended Complaint included additional defendants; however, all but Indiana Gas, IES, and ProLiance have been dismissed by previous motions; therefore, any other defendants, except Indiana Gas, IES, and ProLiance, are omitted from the list of claims set forth below)

(Continued on following page)

against Indiana Gas as well as Indiana Energy Services ("IES") and ProLiance Energy LLC ("ProLiance"), alleging five Counts of Sherman Act antitrust violations, an Indiana state claim of interference with prospective economic advantage, and an Indiana Antitrust Act violation. The Counts directed at defendant ProLiance are: (1) Count II – Sherman Act § 1: Formation and Operation of Defendant ProLiance; (2) Count III – Sherman Act § 1: Tying; (3) Count V – Sherman Act § 2: Attempted Monopolization by Defendants Indiana Gas and ProLiance; (4) Count VI – Tortious Interference with Prospective Economic Advantage, a state claim against defendants Indiana Gas, ProLiance, and IES; and (5) Count VII – Indiana Antitrust Act (IND. CODE §§ 24-1-2-1 *et seq.*) violation, a state claim against defendants Indiana Gas, ProLiance, and IES.

Count I – Shennan Act § 11: Conspiracy between defendant Indiana Gas and Panhandle Eastern Pipeline ("PEPL") (not a party in this action);

Count II – Sherman Act § 1: Formation and operation of defendant ProLiance;

Count III – Sherman Act § 1: Tying

The Tying claim is new to the First Amended Complaint and was not included in the initial Complaint;

Count IV – Sherman Act § 2: Monopolization by defendant Indiana Gas independently and Indiana Gas through defendant ProLiance;

Count V – Sherman Act § 2: Attempted Monopolization by defendants Indiana Gas and ProLiance;

Count VI – Tortious Interference with Prospective Economic Advantage, a state claim against defendants Indiana Gas, ProLiance, and IES; and

Count VII – Indiana Antitrust Act (IND. CODE §§ 24-1-2-1 *et seq.*): claim defendants Indiana Gas, ProLiance, and IES.

This matter is now before the court on defendant ProLiance's motion to dismiss. This court, having considered the motion, the parties' arguments, the facts, and the applicable law, now finds that said motion should be **granted**.

II. JURISDICTION

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1337 and the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and this court exercises supplemental jurisdiction over all state claims pursuant to 28 U.S.C. § 1367.

III. FACTS

In addition to the facts alleged by the plaintiffs, set forth below, the court takes judicial notice of the findings of fact made by the Indiana Utility Regulatory Commission ("IURC") in its September 12, 1997 opinion. Ratepayers of Indiana Gas Co., Inc., No. 40437, (Ind. Util. Reg. Comm'n Sept 12, 1997) (Defendant ProLiance's Appendix A to Brief in Support of Motion to Dismiss, docket # 85) [hereinafter "IURC Sept. 27, 1997 Opinion].[2]

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[2] Although the IURC decision was not part of the pleadings, this court may properly consider it in this matter without converting defendant's motion to dismiss into a motion for summary judgment. Courts are permitted to take judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies. *Menominee Indian Tribe of Wisc v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). The IURC decision is an administrative order and a public record.

Furthermore, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in

(Continued on following page)

Facts Concerning the Parties

1. Plaintiff Midwest Services is an Illinois corporation with its principal place of business in Hinsdale, Illinois, which is in the business of marketing, selling, and arranging for the transport of natural gas, primarily in Illinois and Indiana. (First Amended Complaint, ¶ 1).

2. Plaintiff Midwest Storage is an Indiana corporation with its principal place of business in Clay County, Indiana, which owns a natural gas storage field in Clay County, Indiana. (First Amended Complaint, ¶ 2).

3. Defendant Indiana Gas is an Indiana corporation with its principal place of business located in Indianapolis, Indiana. Indiana Gas owns and operates a natural gas distribution system. Indiana Gas is known as a local distribution company ("LDC"). It distributes gas as a regulated monopoly within the state of Indiana only, not across state lines. Indiana Gas provides gas utility service in 50 Indiana counties. (First Amended Complaint, ¶ 3).

4. Defendant ProLiance, added by the First Amended Complaint, is the unregulated marketing affiliate of Indiana Gas. (First Amended Complaint, ¶ 36).

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plaintiff's complaint and are central to her claim." *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 430 (7th Cir. 1993). In their First Amended Complaint, the plaintiffs made reference Department of Justice investigation, (First Amended Complaint, 144), which related to the IURC proceeding and they included, as Exhibit H, a copy of the Indiana Court of Appeals case, *United Stated Gypsum, Inc. v. Indiana Gas Co.*, No. 93AO2-9710-EX-667 (Ind. Ct. App. Oct. 8, 1990, *vacated*, 735 N.E.2d 790 (Ind. 2000). These opinions are central to plaintiffs' claims and may be considered as part of the pleadings.

According to its March 15, 1996 Formation Agreement, ProLiance was formed by defendants Indiana Gas and IES as well as several other organizations who are not named defendants in this matter. (First Amended Complaint, ¶ 4).

5. Defendant IES, added by the First Amended Complaint, was formed in November 1994 as an unregulated marketing company that competed with Midwest Services for the sale of natural gas. (First Amended Complaint, 36).

6. IES is the predecessor marketing affiliate of Indiana Gas. (First Amended Complaint, ¶ 4).

7. At the time the case was filed, Indiana Gas was a wholly owned subsidiary of Indiana Energy Inc, ("Indiana Energy"), and IES was a wholly owned subsidiary of IGC Energy, which in turn was a wholly owned subsidiary of Indiana Energy. Since this matter was filed, Indiana Energy has merged with Sigcorp., Inc. to form a new company named Vectren Corporation. (Defendant Indiana Gas' Motion to Correct Errors, ¶ 1) (docket # 166).

Facts Concerning the Natural Gas Industry and Deregulation

8. Historically, natural gas and its transportation were bundled together and sold as one. (First Amended Complaint, ¶ 7) in the late 1970s and early 1980s, the Federal Energy Regulatory Commission ("FERC") began efforts to deregulate the natural gas industry to create a competition for the purchase and sale of natural gas, culminating in FERC's Order 636. (First Amended Complaint, ¶ 8). As a result of deregulation, interstate pipeline companies are required to "unbundle" the sale of natural gas from its transportation. They are required to make their pipelines available to

entities other than themselves. (First Amended Complaint, ¶ 8).

9. The Indiana Utility Regulatory (Commission ("IURC") also took steps to unbundle the interstate sale of natural gas from its transportation. (First Amended Complaint, ¶ 8).

Facts Concerning Midwest Storage & Midwest Services

10. Among the purchasers of interstate transportation are gas marketers, which trade in the sale and purchase of natural gas and arrange for its transport to end users. (First Amended Complaint, ¶ 9).

11. On April 30, 1991, Midwest Storage received a certificate from FERC, permitting Midwest Storage to transport gas in and out of Midwest Storage's storage field in Clay County. (First Amended Complaint, ¶ 10).

12. Midwest Storage's storage field is equipped for short-term (peaking) and long-term storage. Previously the storage field was directly connected to the Terre Haute Gas Company's ("THGC") distribution system, which in turn was connected to the Texas Gas Transmission interstate pipeline, which brings gas into the area from Texas and Louisiana; gas from this area generally tends to be a higher priced gas. (First Amended Complaint, ¶ 11).

13. Midwest Storage's field is also located within 14 miles of the Panhandle Eastern Pipeline ("PEPL") interstate pipeline system, which brings gas into the area from the mid-continent region, which is typically a lower priced source of gas. (First Amended Complaint, ¶ 11).

14. Connecting to the two pipeline systems would permit Midwest Storage, its affiliates, and other entities to

take advantage of differences in gas prices between these two regions. In addition, Midwest Storage's services would allow other entities to hedge against a lack of availability of natural gas and the corresponding higher prices. Not only would the entities save on natural gas costs but on transportation costs, storing gas at times when prices were lower and removing it from the field when prices rose. Midwest Storage would earn its profits through storage fees and transportation. (First Amended Complaint, ¶ 11).

15. Indiana Gas purchased the THGC distribution system in 1990. (First Amended Complaint, ¶ 11).

16. Since Midwest Storage is situated closely to Indiana Gas' distribution systems, it began to try to sell its storage services to Indiana Gas in 1989. (First Amended Complaint, ¶ 12).

Facts Concerning the Proposed Interconnect & Resulting Problems

17. Midwest Storage's and Midwest Services' representatives – Terrence O'Malley, Daniel O'Malley, and Gregory Friedrich ("Friedrich") – met regularly with Indiana Gas' representatives – including, Gerald Ulery ("Ulrey"), Curt Hribernik ("Hribernik"), and John Talley ("Talley") – throughout the early 1990s. Indiana Gas declined to purchase gas storage from Midwest Storage. First Amended Complaint, ¶¶ 13, 16).

18. Midwest Storage and Midwest Services representative Friedrich net with Indiana Gas representative Talley in December 1994. Following that meeting, Friedrich understood he had a commitment from Indiana Gas to allow Midwest Storage to interconnect with Indiana Gas' line and that Indiana Gas would contribute $150,000 to the facilities upgrade, since Indiana Gas insisted upon owning those facilities, as reflected in

Friedrich's December 13, 1994 letter. (First Amended Complaint, ¶ 19; letter attached to First Amended Complaint as exhibit D).

19. Talley wrote back to Friedrich, denying that Indiana Gas made any commitments to Midwest Storage to allow an interconnect. (First Amended Complaint, ¶ 20; letter attached to First Amended Complaint as exhibit E).

20. Talley, Lindsey, and Hribernik met with Daniel O'Malley and Friedrich on or about May 31, 1995. O'Malley and Friedrich were pressing for an interconnect on reasonable terms. At that time, Talley told O'Malley and Friedrich that the interconnect would be accomplished at the Margaret Avenue Station Waterworks, which at that time was owned by Texas Gas Transmission, but which Indiana Gas was in the process of purchasing. Talley predicted the interconnect would be completed in fall 1995. (First Amended Complaint, ¶ 21).

21. Midwest Storage began efforts to the clear the right-of-way in anticipation of the Margaret Avenue Station Waterworks interconnect. (First Amended Complaint, ¶ 22).

22. Contrary to what was said at the May 31st meeting, on or about August 18, 1995, Lindsey wrote Friedrich telling him that there would be no more discussions about an interconnect "until an agreement has been signed between our companies." But, Indiana Gas refused to enter into an interconnect agreement unless Midwest Storage agreed to pay for all the facilities and give title to those facilities to Indiana Gas. (First Amended Complaint, ¶ 23) (citing Frank Lindsay's Letter to Terrence O'Malley (Feb. 8, 1996), which is attached to First Amended Complaint as exhibit F).

23. Midwest Storage and Midwest Services believe Indiana Gas purposefully stalled and placed unreasonable restrictions on allowing an interconnect in order to prevent Midwest Storage and its affiliate Midwest Services from competing with Indiana Gas, Indiana Gas' marketing affiliates, and PEPL. (First Amended Complaint, ¶ 24).

24. In order to comply with the obligation imposed upon Indiana Gas by the IURC to make transportation through its pipeline available to end users and marketers, Indiana Gas proposed, and the IURC approved, various tariffs that allowed end users to buy natural gas from other vendors but transport it using Indiana Gas' facilities. (First Amended Complaint, ¶ 25).

25. Among the first such tariffs were Rates 60 and 70. (First Amended Complaint, ¶ 26).

26. Another such tariff is Indiana Gas' Rate 45, which was instituted in 1995, while Midwest Storage was pressing to get an interconnect it had sought for over five years. Rate 45 required Indiana Gas to sell transportation to qualified purchasers through its pipeline at rates approved by the IURC. Qualified purchasers are commercial or industrial customers who use between 50,000 and 500,000 therms of natural gas annually. (First Amended Complaint, ¶ 26).

27. Midwest Services began marketing to the Rate 45 customers. It set up a marketing staff under the direction of its President Friedrich, particularly for this purpose. (First Amended Complaint, ¶ 27).

28. Under Rate 45, Midwest Services was required to contact Indiana Gas to obtain usage data about potential Rate 45 customers to determine whether they were in fact eligible to participate. After Midwest Services requested information about a particular

customer, Indiana Gas would then contact that customer directly. Indiana Gas representatives would tell those customers that it had an unregulated marketing affiliate that could perform the same services. (First Amended Complaint, ¶ 28).

29. Midwest Services anticipated delivering gas to Rate 45 customers, and other commercial and industrial users under Rates 60 and 70, under two scenarios. First, Midwest Services anticipated delivering gas to Indiana Gas' distribution facilities, through the interconnect its sister company, Midwest Storage, was trying to convince Indiana Gas to allow it to build. Second, Midwest Storage proposed to deliver gas from its storage facility to the Indiana Gas distribution system through the PEPL system. Midwest Storage requested it be designated a secondary "receipt/delivery point" pursuant to the transportation contracts between PEPL and Indiana Gas. The designation of secondary receipt and delivery points on interstate pipeline contracts is common. (First Amended Complaint, ¶¶ 29, 30).

30. At the time, Indiana Gas was PEPL's largest customer; now, ProLiance is PEPL's largest customer. (First Amended Complaint, ¶ 31).

31. Indiana Gas asserted that its contracts with PEPL required a senior PEPL officer to approve Midwest Storage's receipt of gas each month; however, that was not required by any contract, FERC rule, or PEPL tariff. (First Amended Complaint, ¶ 31).

32. While Midwest Storage was attempting to be made a secondary receipt/delivery point at Indiana Gas' receipt point on the PEPL pipeline, and while Midwest Storage was trying to get its interconnect from Indiana Gas, Indiana Gas was in contact with PEPL,

unbeknownst to Midwest Storage or Midwest Services. (First Amended Complaint, ¶ 32 Complaint, ¶ 31).

33. Talley of Indiana Gas spoke with Beth Medlin ("Medlin") from PEPL in early June 1995. Medlin summarized Talley's contact as follows in her internal PEPL email:

> John Talley informed me that Midwest Gas Storage was in his office about a week ago. It came up in conversation that IGC [Indiana Gas] could not put Midwest on their contract on a long-term, basis because we have specified that receipt as a month-to-month deal. Apparently, Midwest hit the roof and promised to take it up with PEPL and/or FERC. I wanted ya'll [sic] to be warned, so that we are not caught off guard.

(First Amended Complaint, ¶ 32) (citing to Beth Medlin email letter to John Talley (June 12, 1995), attached to First Amended Complaint as Exhibit G; Complaint, ¶ 31).

34. Midwest Storage discovered Medlin's email during its recent litigation against PEPL. Midwest Storage sued PEPL for predatory conduct. The terms of that settlement, however, are subject to a confidentiality order. (First Amended Complaint, ¶ 33).

35. Indiana Gas never informed Midwest Storage or Midwest Services that it was in contact with PEPL regarding the Midwest Companies. (First Amended Complaint, ¶ 33).

36. Despite the fact that the settlement was subject to a court imposed confidentiality order, Talley telephoned Terrence O'Malley shortly after the settlement was consummated in August 1997, requesting information

about the settlement. O'Malley nor anyone else at the Midwest Companies disclosed settlement information to Talley. (First Amended Complaint, ¶ 33).

37. As a result of Indiana Gas refusing to allow Midwest Storage to interconnect to Indiana Gas' distribution facilities, and because PEPL, together with Indiana Gas, would not make Midwest Storage a receipt/delivery point in their contracts, Midwest Storage and Midwest Services lost transportation fees and Midwest Services lost gas sales. (First Amended Complaint, ¶ 35).

38. In order to sell natural gas, gas marketers must arrange to deliver transported gas to Indiana Gas' city gate. Often, this is accomplished by purchasing "released capacity" from Indiana Gas; that is, Indiana Gas was required to maintain considerably more available transportation than it would normally use, so Indiana Gas would not run out of gas during peak demand periods. (First Amended Complaint, ¶ 36).

39. As a regulated utility, Indiana Gas was required to sell this excess capacity to IES, other gas marketers, and industrial users on an equal basis. (First Amended Complaint, ¶ 36).

40. In December 1995, Indiana Gas had not yet been able to form the ProLiance joint venture (described further below); therefore, Indiana Gas entered into a contract with IES under which IES would become the exclusive supplier of gas and its transportation to Indiana Gas. IES was given control over all of Indiana Gas' supply resources, including commodity agreements, pipeline, and storage capacity. Since IES is not a regulated monopoly like Indiana Gas, IES is not required to release its considerable excess capacity to the general market. (First Amended Complaint, ¶ 36).

Facts Concerning the Creation of ProLiance & the Resulting Problems

41. ProLiance was formed in March 1996 by both Indiana Gas and its affiliates and Citizens Gas and its affiliates. Citizens Gas is a regulated utility that has controlled the sale and distribution of natural gas in and around Indianapolis. Indiana Gas and Citizens Gas contracted with ProLiance to handle all of their gas supply functions. In order to handle these functions, Indiana Gas and Citizens Gas transferred their key personnel to ProLiance. In addition, Indiana Gas and Citizens Gas also transferred their personnel from their unregulated marketing affiliates, IES and CESCO, to ProLiance. (First Amended Complaint, ¶ 37).

42. ProLiance competes directly with other gas marketers, such as Midwest Services. ProLiance markets to large commercial and industrial customers, the same type that Midwest Services had contracted with and hoped to contract with in the future. ProLiance also services all of Indiana Gas' and Citizens Gas' needs. (First Amended Complaint, ¶ 38).

43. As of March 16, 1996, all of Indiana Gas' and Citizens Gas' gas supply resources, including commodity agreements, pipeline, and storage capacity, were transferred to ProLiance, without competitive bidding and at little or no cost. (First Amended Complaint, ¶ 38).

44. Like IES, ProLiance is unregulated and not required to release its excess capacity to the general market. ProLiance has considerable excess capacity because like Indiana Gas, it is required to have sufficient available transportation to meet Indiana Gas' and Citizens Gas' customers' needs during peak demand periods. (First Amended Complaint, ¶ 38).

45. Indiana Gas was actively involved in the formation of ProLiance. Indiana Gas' employees – Talley, Hribernik, Ulrey, among others – worked with Citizens Gas to create ProLiance. Indiana Gas employees participated in many steering group meetings to help create ProLiance. (First Amended Complaint, ¶ 39).

46. ProLiance now controls most of the available, primary, firm, interstate transportation of natural gas into Indiana Gas' distribution system. In a marketing plan that Indiana Gas prepared relating to the formation of ProLiance, Indiana Gas recognized that ProLiance's control of the transportation gas into Indiana Gas' service area would give ProLiance a competitive advantage over other marketers. (First Amended Complaint, ¶ 40).

47. Indiana Gas, as an LDC, controls all of the transportation of natural gas within its service areas, which is the north central, central, and southern portions of Indiana, comprising 50 counties. (First Amended Complaint, ¶ 41).

48. Through it's subsidiary ProLiance, Indiana Gas controls the transportation of gas into its system off of interstate pipelines. The relevant market ("the market") for purposes of this case is the market for transporting and selling gas to end users that are allowed by tariff to receive transported natural gas in the 50 counties in north central, central, and southern Indiana, the areas in which Indiana Gas is an LDC. (First Amended Complaint, ¶ 42).

49. Other than Midwest Storage, there is no other independent storage facility in the area; however, Indiana Gas has not permitted Midwest Storage to connect its storage field to the Indiana Gas pipeline system. Indiana Gas and PEPL have denied Midwest Storage access as a receipt/delivery point on Indiana Gas' (now

ProLiance's) market. Therefore, transport-eligible customers do not have the option of storing gas in an independent storage field to meet their peak demands. (First Amended Complaint, ¶ 42).

50. Indiana Energy, Inc. ("Indiana Energy"), the parent company of Indiana Gas, has profited greatly through ProLiance. According to Indiana Energy's 1999 10-K, pre-tax earnings recognized by Indiana Energy from ProLiance totaled approximately $9.2 million in 1999, $7.4 million in 1998, and $ 8.9 million in 1997. (First Amended Complaint, ¶ 43).

Facts Concerning the Justice Department Investigation & Following Court Proceedings

51. Furthermore, according to Indiana Energy's 1999-10-K, on or about August 11, 1998, Indiana Gas, Citizens Gas, and ProLiance each received a Civil Investigative Demand ("CID") from the United States Department of Justice requesting information relating to Indiana Gas' and Citizens Gas' relationship with and the activities of ProLiance.

52. The Department of Justice issued the CID to gather information regarding ProLiance's formation and operations and to determine if trade or commerce has been restrained. (First Amended Complaint, ¶ 44).

53. Within days after ProLiance was formed in March 1996, several transport-eligible Indiana Gas customers and gas marketers (the Midwest Companies were not a party to this action before the IURC) asserted similar theories and allegations as the plaintiffs do in this case before the court. In a fifty-nine page opinion, IURC rejected the customers' and marketers' claims. The parties then appealed to the Indiana Court of Appeals. (Defendant's Brief in Support of Motion, at 9 (citing *Petition by Ratepayers of Indiana Gas Co. et*

al., No. 40437 (Sept 12, 1997), included as Appendix A to Defendant's Brief).

54. The Indiana Appellate Court issued an opinion, in a case the Midwest Companies were not a party to, on October 8, 1998, holding that Indiana Gas violated Indiana Law by forming ProLiance without proper regulatory approval. (First Amended Complaint, ¶ 45) (citing *United States Gypsum, Inc. et al. v. Indiana Gas Co.*, No. 93A02-9710-EX-667 (Ind. Ct. App. Oct. 1998) (attached to First Amended Complaint as Exhibit H).

55. At the time plaintiffs filed their First Amended Complaint and at the time the briefs were filed, the Indiana Court of Appeals *Gypsum* case was pending before the Indiana Supreme Court. (First Amended Complaint, ¶ 45).

56. In November 1998, Indiana Gas conditioned any further discussions with Midwest Storage concerning an interconnect on Midwest releasing all claims against Indiana Gas set forth in plaintiffs' First Amended Complaint in this matter. (First Amended Complaint, ¶ 46).

57. The Indiana Supreme Court granted transfer of the Indiana Court of Appeals *Gypsum* decision and on September 22, 1999, affirmed the original IURC decision. *United States Gypsum, Inc. et al. v. Indiana Gas Co.*, 735 N.E.2d 790 (Ind. 2000) (this opinion is also attached to Defendant ProLiance's Submission of Supplemental Authority, docket # 154).

IV. Discussion

A. Standard of Review: Motion to Dismiss, Rule 12(b)(6)

When considering a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court examines the sufficiency of the complaint, not the merits of the lawsuit. *Demitropoulos v. Bank One Milwaukee, N.A.*, 915 F. Supp. 1399, 1406 (N.D. Ill. 1996) (citing *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990)). A court should dismiss a complaint for failure to state a claim only if it appears to a legal certainty that the plaintiff would not be entitled to relief under any set of facts. *Hamlin v. Vaudenberg*, 95 F.3d 580 (7th Cir. 1996). "A complaint must state either direct or inferential allegations concerning all of the material elements necessary for recovery under the relevant legal theory." *Carl Sandburg Village Condominium Ass'n No. 1 v. First Condominium Dev. Co.*, 758 F.2d 203, 207 (7th Cir. 1985).

The court shall accept all the facts in the complaint and supporting documents as true and draw all reasonable inferences in favor of the plaintiff. *Mallett v. Wisconsin Div. of Vocational Rehabilitation,* 130 F.3d 1245, 1248 (7th Cir. 1997); *see also Porter v. DiBlasio,* 93 F.3d 301, 305 (7th Cir. 1996); *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605 (7th Cir. 1995).

However, the court is not obliged to accept mere unsupported conclusions of fact, nor must it ignore factual allegations in the pleadings that undermine the non-movant's claims. *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998). The court is also not bound by the non-movant's legal conclusions. *National Fidelity Life Ins. v. Karaganis*,

811 F.2d 357, 358 (7th Cir. 1987); *McMahan v. Cornelius*, 756 F.2d 1156, 1157 (S.D. Ind. 1991). For example, in the antitrust context, a plaintiff cannot establish a viable cause of action capable of surviving a motion for judgment on the pleadings "by attaching bare legal conclusions to the facts he narrates: if he claims an antitrust violation, but the facts he narrates do not at least outline or adumbrate such a violation, he will get nowhere by merely dressing them up in the language of antitrust." *Sutcliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984). Where the plaintiff can prove no set of facts that would entitle him to relief, a dismissal is proper. *Mallett*, 130 F.3d at 1248; *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

B. Federal Antitrust Standing

Defendant ProLiance asserts that the Midwest Companies lack standing to bring an antitrust claim. Plaintiffs bring their antitrust claims pursuant to the Sherman Act. 15 U.S.C. § 1, *et seq.* For an individual, or entity, to bring an antitrust cause of action under the Sherman Act, section 4 of the Clayton Act provides that they must "be injured in his business or property by reason of anything forbidden in antitrust laws." 15 U.S.C. § 15. Courts have narrowed the broad language of section 4 of the Clayton Act to limit parties to those "1) who have suffered the type of injury that the antitrust laws were intended to prevent (antitrust injury) and 2) whose injuries are a result of defendant's unlawful conduct (antitrust standing)." *In re Copper Antitrust Lit.*, 98 F. Supp. 1039, 1047 (W.D. Wis. 2000) (citing *Serfcz v. Jewel Food Stores*, 67 F.3d 591, 595 (7th Cir. 1995).

Thus, establishing an antitrust injury is an integral part of establishing antitrust standing. To establish an antitrust injury, plaintiff must show "that the antitrust laws protect his or her interests and that the violation was the cause-in-fact of the injury." *Copper Antitrust Lit.*, 98 F. Supp. at 1048. As the purpose of antitrust laws is to protect competition, not competitors, standing is granted to those who are in the best position to vindicate the violation; in other words, "[w]hen the plaintiff's injury is linked to the injury inflicted upon the market . . . the compensation of the injured party promotes the purpose of the antitrust law – the preservation of competition." *Id.*

Antitrust standing, therefore, is limited to those "who can show 'a direct link between the antitrust violation and the antitrust injury.'" *AlliedSignal, Inc. v. B.F. Goodrich, Co.*, 183 F.3d 568, 575 (7th Cir. 1999) (quoting *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993). To make this determination, the court is to examine several factors: "(1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the nature of the Plaintiff's injury and the relationship between the plaintiff's injury and the type of activity sought to be redressed under the antitrust laws; and (3) the speculative nature of the plaintiff's claim for damages and the potential for duplicative recovery or complex apportionment of damages." *AlliedSignal*, 193 F.3d at 575 (citing *Associate Gen. Contractors of Ca. v. California State Council of Carpenters*, 459 U.S. 519, 537-46 (1983)).

Recently, a federal court examined the antitrust standing of a public utility in a market context highly similar to this case. *Indeck Energy Serv., Inc. v. Consumers Energy Co.*, 234 F.3d 1268, 2000 WL 1529802 (6th Cir.

2000) (per curiam).[3] The *Indeck* court determined that the only harm allegedly suffered by the plaintiff utility in that case was in its "capacity as a competitor, not as a defender of marketplace competition." *Id.* at *3. And, while the *Indeck* court noted that antitrust actions may be brought by competitors, it held that they "must at least allege that [their exclusion] from the marketplace results in the elimination of a superior product or a lower-cost alternative"; otherwise the antitrust damages alleged are simply too indirect and too speculative to justify federal antitrust jurisdiction. *Id.* The plaintiff in *Indeck* merely alleged that the defendant utility purchased necessary power from its affiliate producer and that consequently, the defendant excluded over eighty percent of the competition while keeping supplemental and alternative sources like plaintiff out of the market. *Id.*, at *1. According to the *Indeck* court, this type of allegation does not rise to the level of an antitrust injury because permitting the *Indeck* plaintiff to have antitrust standing based upon its allegations would

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[3] This unpublished case was brought to the court's attention by ProLiance's Second Submission of Supplemental Authority Supporting ProLiance's Motion to Dismiss (docket # 117). Although this case is unpublished, the court may look to it for guidance under both Seventh Circuit and Sixth Circuit rules. The Seventh Circuit permits citation to unpublished opinions of another circuit court if the court that rendered the opinion does not prohibit citation. 7th Cir. R. 53(e). Under the Sixth Circuit's rules, a court may cite to an unpublished Sixth Circuit opinion when "an unpublished disposition has precedential value in relation to a material issue in a case and . . . there is no published opinion that would serve as well. 6th Cir. R. 28(g); *see also In re Hess*, 209 B.R. 79, 82 n.3 (B.A.P. 6th Cir. 1997) ("Although unpublished decisions of the Sixth Circuit are not binding precedent, they can be cited if persuasive, especially where there are no published decisions which will serve as well.").

lead to "routine disputes between business competitors [being] elevated to the status of an antitrust action, thereby trivializing the [Antitrust] Act because of its too ready availability." *Id.* at 2 (quoting *Capital Imaging Assocs., P. C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)).

Similarly, in this case, the Midwest companies allege that ProLiance competes directly with Midwest Services and that it had taken away some of Midwest Services' potential customers thereby causing the plaintiffs to lose transportation fees and gas sales and preventing consumers from having alternative choices. (First Amended Complaint, ¶¶ 35, 38). Thus, like the plaintiff in *Indeck*, the Midwest Companies are suing in the "capacity as a competitor, not as a defender of marketplace competition." *Indeck*, 2000 WL 1529802, at *3. However, even if the Midwest Companies had alleged that their exclusion from the marketplace resulted in elimination of a superior product or lower-cost alternative, the court would still find that the plaintiffs had not established antitrust standing[4]

[4] In addition to the fact that both Midwest Storage and Midwest Services fail to establish an antitrust injury, Midwest Storage would also lacks standing because it is neither a consumer or a competitor. Antitrust standing is granted "only to those who, as consumers or competitors, suffer immediate injuries with respect to their business or property, while excluding persons whose injuries were more indirectly caused by the antitrust conduct." *Serfecz v, Jewell Food Stores*, 67 F.3d 591, 598 (7th Cir. 1995) (quoting *In Re Indus. Gas Antitrust Litig.*, 681 F.2d 514, 520 (7th Cir. 1982).

In their First Amended Complaint, plaintiffs indicate that Midwest Storage did not seek to compete with ProLiance in the relevant market, the market for transporting and selling gas to end users. (First Amended Complain, ¶¶ 30, 38). Rather, Midwest Storage would compete with other pipelines, not marketers, to supply storage facilities

(Continued on following page)

because such an allegation is undermined by the supporting documents attached to plaintiffs' First Amended Complaint. *Northern Ind. Gun & Outdoor Shows*, 163 F.3d at 452. Specifically, the Indiana Supreme Court case – which vacated the Indiana Court of Appeals case that was attached to plaintiffs' complaint as Exhibit H – affirmed the IURC's order and held that the creation and operation of ProLiance is in the public's interest. *Gypsum*, 735 F.2d at 803-04. The Indiana Supreme Court affirmed the IURC's findings that ProLiance has not detrimentally affected the gas transportation market: no anti-competitive price patterns have emerged and the affected markets are "as robust after the formation of ProLiance as they were prior to its formation." *Id.* at 804 (quoting IURC Sept. 27, 1997 Opinion, at 54); *see also* IURC Sept. 27, 1997 Opinion, at 20-29; 40-42, 45, 55-58 (examining public interest and market affects).

Given the finding that the creation and operation of ProLiance is in the public interest and that "post-ProLiance, the market place continues to function with no ill effects", (IURC Sept. 27, 2007 Opinion, at 41), plaintiffs are unable to establish an antitrust injury as there was no injury to the relevant market, therefore, they lack antitrust standing. Defendant ProLiance's motion to dismiss is **granted** as to all of plaintiffs' federal antitrust claims brought against it in this matter.

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to the direct market participants. (First Amended Complaint, ¶¶ 11, 14, 30). "Suppliers to direct market participants[, however,] typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect." *Serfecz*, 67 F.3d at 597.

C. Indiana Antitrust Standing

The Indiana Antitrust Act is patterned after the federal Sherman Antitrust Act, and when determining the adequacy of plaintiffs' Indiana state law antitrust allegations, this court can be guided by federal antitrust decisions. *McLane v. Pizza King Franchises, Inc.*, 1987-2 Trade Cases P 67,723,1987 WL 92061, *7 (Ind. Super. 1987). Indiana courts, in fact, have consistently interpreted the Indiana Antitrust Act with the Sherman Act and have ruled that the Indiana Act is not broader than the federal law. *Id.*

Thus, since the plaintiffs lack federal antitrust standing, this court may conclude that the plaintiffs lack antitrust standing for their Indiana state law antitrust claims. Accordingly, defendant ProLiance's motion to dismiss is **granted** as to both of plaintiffs' Indiana state law claims as well.

VI. Conclusion

Plaintiffs Midwest Storage and Midwest Services lack antitrust standing for both their federal and state antitrust claims because they have failed to demonstrate the requisite antitrust injury. Consequently, the court finds that defendant ProLiance's motion to dismiss is hereby **granted** as to all Counts. Defendant ProLiance is no longer a party to this matter.

It is so ordered this 20th day of ~~March~~ April 2001.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana
Indianapolis Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST GAS SERVICES, INC., and MIDWEST GAS STORAGE, Plaintiffs,	)	IP 99-0690-C-Y/G
vs.	)	
INDIANA GAS COMPANY, INC., INDIANA ENERGY SERVICES, INC., and PROLIANCE ENERGY, LLC, Defendants.	)	

FINAL JUDGMENT

The court, having this day made its entry, now enters final judgment in favor of defendant ProLiance Energy, LLC. It is now therefore adjudged and decreed that defendant's motion to dismiss is hereby **granted**.

It is so ordered this 20th day of April 2001.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana
Indianapolis Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST GAS SERVICES, INC., and MIDWEST GAS STORAGE, Plaintiffs,	)	
vs.	)	IP 99-0690-C-Y/G
INDIANA GAS COMPANY, INC., INDIANA ENERGY SERVICES, INC., and PROLIANCE ENERGY, LLC, Defendants.	)	

SUA SPONTE ENTRY ON DEFENDANT INDIANA GAS' MOTION TO CORRECT ERRORS

I. INTRODUCTION

Having this day made its Entry on defendant ProLiance Energy, Inc.'s ("ProLiance") motion to dismiss, this court reconsiders sua sponte its rulings as to defendant Indiana Gas Co., Inc.'s ("Indiana Gas") motion for judgment on the pleadings (*see* docket ## 37, 153) and motion to correct errors (*see* docket ## 166, 175).

In light of defendant ProLiance's second submission of supplemental authority,[1] the court finds that plaintiffs

[1] In its second submission of supplemental authority to support its motion to dismiss (docket # 117), defendant ProLiance brought to the court's attention an unpublished, Sixth Circuit case, *Indeck Energy Serv, Inc. v. Consumers Energy Co.*, 234 F.3d 1268, 2000 WL 1529802

(Continued on following page)

Midwest Gas services ("Midwest Services") and Midwest Gas Storage ("Midwest Storage") (collectively, "Midwest companies") lack standing to bring their antitrust suit; thus, the court now finds that defendant Indiana Gas' motion for judgment on the pleadings is **granted** for the reasons set forth below.

II. JURISDICTION

This court exercises jurisdiction over the federal claims pursuant to 28 U.S.C. § 1337 and the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and this court exercises supplemental jurisdiction over all state claims pursuant to 28 U.S.C. § 1367.

III. FACTS

In addition to the facts alleged by the plaintiffs, set forth below, the court takes judicial notice of the findings of fact made by the Indiana Utility. Regulatory Commission ("IURC") in its September 12, 1997 opinion. Ratepayers of Indiana Gas Co., Inc., No. 40437, (Ind. Util.

(6th Cir. 2000). Although this case is unpublished, the court may look to it for guidance under both Seventh Circuit and Sixth Circuit rules. The Seventh Circuit permits citation to unpublished opinions of another circuit court if the court that rendered the opinion does not prohibit citation. 7th Cir. R. 53(e). Under the Sixth Circuit's rules, a court may cite to a unpublished Sixth Circuit opinion when "an unpublished disposition has precedential value in relations to a material issue in a case and . . . there is no published opinion that would serve as well. 6th Cir. R. 28(g); *see also In re Hess*, 209 B.R. 79, 82 n.3 (B.A.P. 6th Cir. 1997) ("Although unpublished decisions of the Sixth Circuit are not binding precedent, they can be cited if persuasive, especially where there are no published decisions which will serve as well.").

Reg. Comm'n Sept. 12, 1997) (Defendant ProLiance's Appendix A to Brief in Support of Motion to Dismiss, docket # 85) [hereinafter "IURC Sept. 27, 1997 Opinion].[2]

III. Facts Concerning the Parties

1. Plaintiff Midwest Services is an Illinois corporation with its principal place of business in Hinsdale, Illinois, which is in the business of marketing, selling, and arranging for the transport of natural gas, primarily in Illinois and Indiana. (First Amended Complaint, ¶ 1).

2. Plaintiff Midwest Storage is an Indiana corporation with its principal place of business in Clay

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[2] Although the IURC decision was not part of the pleadings, this court may properly consider it in this matter without converting defendant's motion to dismiss into a motion for summary judgment. Courts are permitted to take judicial notice of historical documents, documents contained in the public record, and reports of administrative bodies. *Menominee Indian Tribe of Wisc v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). The IURC decision is an administrative order and a public record.

Furthermore, "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in plaintiff's complaint and are central to her claim." *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 430 (7th Cir. 1993). In their First Amended Complaint, the plaintiffs made reference Department of Justice investigation, (First Amended Complaint, ¶ 44), which related to the IURC proceeding and they included, as Exhibit H, a copy of the Indiana Court of Appeals case, *United Stated Gypsum, Inc. v Indiana Gas Co.*, No. 93A02-9710-EX-667 (Ind. Ct. App. Oct. 8, 1998), *rev'd*, 735 N.E.2d 790 (Ind. 2000). These opinions are central to plaintiffs' claims and may be considered as part of the pleadings.

County, Indiana, which owns a natural gas storage field in Clay County, Indiana. (First Amended Complaint, ¶ 2).

3. Defendant Indiana Gas is an Indiana corporation with its principal place of business located in Indianapolis, Indiana. Indiana Gas owns and operates a natural gas distribution system. Indiana Gas is known as a local distribution company ("LDC"). It distributed gas as a regulated monopoly within the state of Indiana only, not across state lines. Indiana Gas provides gas utility service in 50 Indiana counties. (First Amended Complaint, ¶ 3).

4. Defendant ProLiance, added by the First Amended Complaint, is the unregulated marketing affiliate of Indiana Gas. (First Amended Complaint, ¶ 36). According to its March 15, 1996 Formation Agreement, ProLiance was formed by defendants Indiana Gas and IES as well as several other organizations who are not named defendants in this matter. (First Amended Complaint, ¶ 4).

5. Defendant IES, added by the First Amended Complaint, was formed in November 1994 as an unregulated marketing company that competed with Midwest Services for the sale of natural gas. (First Amended Complaint, ¶ 36).

6. IES is the predecessor marketing affiliate of Indiana Gas. (First Amended Complaint, ¶ 4).

Facts Concerning the Natural Gas Industry and Deregulation

7. Historically, natural gas and its transportation were bundled together and sold as one. (First

Amended Complaint, ¶ 7) In the late 1970s and early 1980s, the Federal Energy Regulatory Commission ("FERC") began efforts to deregulate the natural gas industry to create competition for the purchase and sale of natural gas, culminating in FERC's Order 636. (First Amended Complaint, ¶ 8). As a result of deregulation, interstate pipeline companies are required to "unbundle" the sale of natural gas from its transportation. They are required to make their pipelines available to entities other than themselves. (First Amended Complaint, ¶ 8).

8. The Indiana Utility Regulatory Commission ("IURC") also took steps to unbundle the interstate sale of natural gas from its transportation. (First Amended Complaint, ¶ 8).

Facts Concerning Midwest Storage & Midwest Services

9. Among the purchasers of interstate transportation are gas marketers, which trade in the sale and purchase of natural gas and arrange for its transport to end users. (First Amended Complaint, ¶ 9).

10. On April 30, 1991, Midwest Storage received a certificate from FERC, permitting Midwest Storage to transport gas in and out of Midwest Storage's storage field in Clay County. (First Amended Complaint, ¶ 10).

11. Midwest Storage's storage field is equipped for short-term (peaking) and long-term storage. Previously the storage field was directly connected to the Terre Haute Gas Company's ("THGC") distribution system, which in turn was

connected to the Texas Gas Transmission interstate pipeline, which brings gas into the area from Texas and Louisiana; gas from this area generally tends to be a higher priced gas. (First Amended Complaint, ¶ 11).

12. Midwest Storage's field is also located within 14 miles of the Panhandle Eastern Pipeline ("PEPL") interstate pipeline system, which brings gas into the area from the mid-continent region, which is typically a lower priced source of gas. (First Amended Complaint, ¶ 11).

13. Connecting to the two pipeline systems would permit Midwest Storage, its affiliates, and other entities to take advantage of differences in gas prices between these two regions. In addition, Midwest Storage's services would allow other entities to hedge against a lack of availability of natural gas and the corresponding higher prices. Not only would the entities save on natural gas costs but on transportation costs, storing gas at times when prices were lower and removing it from the field when prices rose. Midwest Storage would earn its profits through storage fees and transportation. (First Amended Complaint, ¶ 11).

14. Indiana Gas purchased the THGC distribution system in 1990. (First Amended Complaint, ¶ 11).

15. Since Midwest Storage is situated closely to Indiana Gas' distribution systems, it began to try to sell its storage services to Indiana Gas in 1989. (First Amended Complaint, ¶ 12).

Facts Concerning the Proposed Interconnect & Resulting Problems

16. Midwest Storage's and Midwest Services' representatives – Terrence O'Malley, Daniel O'Malley, and Gregory Friedrich ("Friedrich") – met regularly with Indiana Gas' representatives – including, Gerald Ulrey ("Ulrey"), Curt Hribernik ("Hribernik"), and John Talley ("Talley") – throughout the early 1990s. Indiana Gas declined to purchase gas storage from Midwest Storage. (First Amended Complaint, ¶¶ 13, 16).

17. Midwest Storage and Midwest Services representative Friedrich met with Indiana Gas representative Talley in December 1994. Following that meeting, Friedrich understood he had a commitment from Indiana Gas to allow Midwest Storage to interconnect with Indiana Gas' line and that Indiana Gas would contribute $150,000 to the facilities upgrade, since Indiana Gas insisted upon owning those facilities, as reflected in Friedrich's December 13, 1994 letter. (First Amended Complaint, ¶ 19; letter attached to First Amended Complaint as exhibit D).

18. Talley wrote back to Friedrich, denying that Indiana Gas made any commitments to Midwest Storage to allow an interconnect. (First Amended Complaint, ¶ 20; letter attached to First Amended Complaint as exhibit E).

19. Talley, Lindsey, and Hribernik met with Daniel O'Malley and Friedrich on or about May 31, 1995. O'Malley and Friedrich were pressing for an interconnect on reasonable terms. At that time, Talley told O'Malley and Friedrich that the interconnect would be accomplished at the Margaret Avenue Station Waterworks, which at that

time was owned by Texas Gas Transmission, but which Indiana Gas was in the process of purchasing. Talley predicted the interconnect would be completed in fall 1995. (First Amended Complaint, ¶ 21).

20. Midwest Storage began efforts to the clear the right-of-way in anticipation of the Margaret Avenue Station Waterworks interconnect. (First Amended Complaint, ¶ 22).

21. Contrary to what was said at the May 31st meeting, on or about August 18, 1995, Lindsey wrote Friedrich telling him that there would be no more discussions about an interconnect "until an agreement has been signed between our companies." But, Indiana Gas refused to enter into an interconnect agreement unless Midwest Storage agreed to pay for all the facilities and give title to those facilities to Indiana Gas. (First Amended Complaint, ¶ 23) (citing Frank Lindsey's Letter to Terrence O'Malley (Feb. 8, 1996), which is attached to First Amended Complaint as exhibit F).

22. Midwest Storage and Midwest Services believe Indiana Gas purposefully stalled and placed unreasonable restrictions on allowing an interconnect in order to prevent Midwest Storage and its affiliate Midwest Services from competing with Indiana Gas, Indiana Gas' marketing affiliates, and PEPL. (First Amended Complaint, ¶ 24).

23. In order to comply with the obligation imposed upon Indiana Gas by the IURC to make transportation through its pipeline available to end users and marketers, Indiana Gas proposed, and the IURC approved, various tariffs that allowed end users to buy natural gas from other vendors

but transport it using Indiana Gas' facilities. (First Amended Complaint, ¶ 25).

24. Among the first such tariffs were Rates 60 and 70. (First Amended Complaint, ¶ 26).

25. Another such tariff is Indiana Gas' Rate 45, which was instituted in 1995, while Midwest Storage was pressing to get an interconnect it had sought for over five years. Rate 45 required Indiana Gas to sell transportation to qualified purchasers through its pipeline at rates approved by the IURC. Qualified purchasers are commercial or industrial customers who use between 50,000 and 500,000 therms, of natural gas annually. (First Amended Complaint, ¶ 26).

26. Midwest Services began marketing to the Rate 45 customers. It set up a marketing staff under the direction of its President Friedrich, particularly for this purpose. (First Amended Complaint, ¶ 27).

27. Under Rate 45, Midwest Services was required to contact Indiana Gas to obtain usage data about potential Rate 45 customers to determine whether they were in fact eligible to participate. After Midwest Services requested information about a particular customer, Indiana Gas would then contact that customer directly. Indiana Gas representatives would tell those customers that it had an unregulated marketing affiliate that could perform the same services. (First Amended Complaint, ¶ 28).

28. Midwest Services anticipated delivering gas to Rate 45 customers, and other commercial and industrial users under Rates 60 and 70, under two scenarios. First, Midwest Services anticipated delivering gas to Indiana Gas' distribution

facilities, through the interconnect its sister company, Midwest Storage, was trying to convince Indiana Gas to allow it to build. Second, Midwest Storage proposed to deliver gas from its storage facility to the Indiana Gas distribution system through the PEPL system. Midwest Storage requested it be designated a secondary "receipt/delivery point" pursuant to the transportation contracts between PEPL and Indiana Gas. The designation of secondary receipt and delivery points on interstate pipeline contracts is common. (First Amended Complaint, ¶¶ 29, 30).

29. At the time, Indiana Gas was PEPL's largest customer; now, ProLiance is PEPL's largest customer. (First Amended Complaint, ¶ 31).

30. Indiana Gas asserted that its contracts with PEPL required a senior PEPL officer to approve Midwest Storage's receipt of gas each month; however, that was not required by any contract, FERC rule, or PEPL tariff. (First Amended Complaint, ¶ 31).

31. While Midwest Storage was attempting to be made a secondary receipt/delivery point at Indiana Gas' receipt point on the PEPL pipeline, and while Midwest Storage was trying to get its interconnect from Indiana Gas, Indiana Gas was in contact with PEPL, unbeknownst to Midwest Storage or Midwest Services. (First Amended Complaint, ¶ 32 Complaint, ¶ 31).

32. Talley of Indiana Gas spoke with Beth Medlin ("Medlin") from PEPL in early June 1995. Medlin summarized Talley's contact as follows in her internal PEPL email:

> John Talley informed me that Midwest Gas Storage was in his office about a week ago.

> It came up in conversation that IGC [Indiana Gas] could not put Midwest on their contract on a long-term, basis because we have specified that receipt as a month-to-month deal. Apparently, Midwest hit the roof and promised to take it up with PEPL and/or FERC. I wanted ya'll [sic] to be warned, so that we are not caught off guard.

(First Amended Complaint, ¶ 32) (citing to Beth Medlin email letter to John Talley (June 12, 1995), attached to First Amended Complaint as Exhibit G; Complaint, ¶ 31).

33. Midwest Storage discovered Medlin's email during its recent litigation against PEPL. Midwest Storage sued PEPL for predatory conduct. The terms of that settlement, however, are subject to a confidentiality order. (First Amended Complaint, ¶ 33).

34. Indiana Gas never informed Midwest Storage or Midwest Services that it was in contact with PEPL regarding the Midwest Companies. (First Amended Complaint, ¶ 33).

35. Despite the fact that the settlement was subject to a court imposed confidentiality order, Talley telephoned Terrence O'Malley shortly after the settlement was consummated in August 1997, requesting information about the settlement. O'Malley nor anyone else at the Midwest Companies disclosed settlement information to Talley. (First Amended Complaint, ¶ 33).

36. As a result of Indiana Gas refusing to allow Midwest Storage to interconnect to Indiana Gas' distribution facilities, and because PEPL, together with Indiana Gas, would not make Midwest

Storage a receipt/delivery point in their contracts, Midwest Storage and Midwest Services lost transportation fees and Midwest Services lost gas sales. (First Amended Complaint, ¶ 35).

37. In order to sell natural gas, gas marketers must arrange to deliver transported gas to Indiana Gas' city gate. Often, this is accomplished by purchasing "released capacity" from Indiana Gas; that is, Indiana Gas was required to maintain considerably more available transportation than it would normally use, so Indiana Gas would not run out of gas during peak demand periods. (First Amended Complaint, ¶ 36).

38. As a regulated utility, Indiana Gas was required to sell this excess capacity to IES, other gas marketers, and industrial users on an equal basis. (First Amended Complaint, ¶ 36).

39. In December 1995, Indiana Gas had not yet been able to form the ProLiance joint venture (described further below); therefore, Indiana Gas entered into a contract with IES under which IES would become the exclusive supplier of gas and its transportation to Indiana Gas. IES was given control over all of Indiana Gas' supply resources, including commodity agreements, pipeline, and storage capacity. Since IES is not a regulated monopoly like Indiana Gas, IES is not required to release its considerable excess capacity to the general market. (First Amended Complaint, ¶ 3).

Facts Concerning the Creation of ProLiance & the Resulting Problems

40. ProLiance was formed in March 1996 by both Indiana Gas and its affiliates and Citizens Gas

and its affiliates. Citizens Gas is a regulated utility that has controlled the sale and distribution of natural gas in and around Indianapolis. Indiana Gas and Citizens Gas contracted with ProLiance to handle all of their gas supply functions. In order to handle these functions, Indiana Gas and Citizens Gas transferred their key personnel to ProLiance. In addition, Indiana Gas and Citizens Gas also transferred their personnel from their unregulated marketing affiliates, IES and CESCO, to ProLiance. (First Amended Complaint, ¶ 37).

41. ProLiance competes directly with other gas marketers, such as Midwest Services. ProLiance markets to large commercial and industrial customers, the same type that Midwest Services had contracted with and hoped to contract with in the future. ProLiance also services all of Indiana Gas' and Citizens Gas' needs. (First Amended Complaint, ¶ 38).

42. As of March 16, 1996, all of Indiana Gas' and Citizens Gas' gas supply resources, including commodity agreements, pipeline, and storage capacity, were transferred to ProLiance, without competitive bidding and at little or no cost. (First Amended Complaint, ¶ 38).

43. Like IES, ProLiance is unregulated and not required to release its excess capacity to the general market. ProLiance has considerable excess capacity because like Indiana Gas, it is required to have sufficient available transportation to meet Indiana Gas' and Citizens Gas' customers' needs during peak demand periods. (First Amended Complaint, ¶ 38).

44. Indiana Gas was actively involved in the formation of ProLiance. Indiana Gas' employees – Talley, Hribernik, Ulrey, among others – worked with Citizens Gas to create ProLiance. Indiana Gas employees participated in many steering group meetings to help create ProLiance. (First Amended Complaint, ¶ 39).

45. ProLiance now controls most of the available, primary, firm, interstate transportation of natural gas into Indiana Gas' distribution system. In a marketing plan that Indiana Gas prepared relating to the formation of ProLiance, Indiana Gas recognized that ProLiance's control of the transportation gas into Indiana Gas' service area would give ProLiance a competitive advantage over other marketers. (First Amended Complaint, ¶ 40).

46. Indiana Gas, as an LDC, controls all of the transportation of natural gas within its service areas, which is the north central, central, and southern portions of Indiana, comprising 50 counties. (First Amended Complaint, ¶ 41).

47. Through it's subsidiary ProLiance, Indiana Gas controls the transportation of gas into its system off of interstate pipelines. The relevant market ("the market") for purposes of this case is the market for transporting and selling gas to end users that are allowed by tariff to receive transported natural gas in the 50 counties in north central, central, and southern Indiana, the areas in which Indiana Gas is an LDC. (First Amended Complaint, ¶ 42).

48. Other than Midwest Storage, there is no other independent storage facility in the area; however, Indiana Gas has not permitted Midwest

Storage to connect its storage field to the Indiana Gas pipeline system. Indiana Gas and PEPL have denied Midwest Storage access as a receipt/delivery point on Indiana Gas' (now ProLiance's) market. Therefore, transport-eligible customers do not have the option of storing gas in an independent storage field to meet their peak demands. (First Amended Complaint, ¶ 42).

49. Indiana Energy, Inc. ("Indiana Energy"), the parent company of Indiana Gas, has profited greatly through ProLiance. According to Indiana Energy's 1999 10-K, pre-tax earnings recognized by Indiana Energy from ProLiance totaled approximately $9.2 million in 1999, $7.4 million in 1998, and $8.9 million in 1997. (First Amended Complaint, ¶ 43).

Facts Concerning the Justice Department Investigation & Following Court Proceedings

50. Furthermore, according to Indiana Energy's 1999-10-K, on or about August 11, 1998, Indiana Gas, Citizens Gas, and ProLiance each received a Civil Investigative Demand ("CID") from the United States Department of Justice requesting information relating to Indiana Gas' and Citizens Gas' relationship with and the activities of ProLiance.

51. The Department of Justice issued the CID to gather information regarding ProLiance's formation and operations and to determine if trade or commerce has been restrained. (First Amended Complaint, ¶ 44).

52. Within days after ProLiance was formed in March 1996, several transport-eligible Indiana Gas

customers and gas marketers (the Midwest Companies were not a party to this action before the IURC) asserted similar theories and allegations as the plaintiffs do in this case before the court. In a fifty-nine page opinion, IURC rejected the customers and marketers claims in its opinion. The parties then appealed to the Indiana Court of Appeals. (Defendant's Brief in Support of Motion, at 9 (citing *Petition by Ratepayers of Indiana Gas Co. et al.*, No. 40437 (Sept. 12, 1997), included as Appendix A to Defendant's Brief).

53. The Indiana Appellate Court issued an opinion, in a case the Midwest Companies were not a party to, on October 8, 1998, holding that Indiana Gas violated Indiana Law by forming ProLiance without proper regulatory approval. (First Amended Complaint, ¶ 45) (citing *United States Gypsum, Inc. et al. v. Indiana Gas Co.*, No. 93A02-9710-EX-667 (Ind. Ct. App. Oct. 1998) (attached to First Amended Complaint as Exhibit H).

54. At the time plaintiffs filed their First Amended Complaint and at the time the briefs were filed, the case was before the Indiana Supreme Court. (First Amended Complaint, ¶ 45).

55. In November 1998, Indiana Gas conditioned any further discussions with Midwest Storage concerning an interconnect on Midwest releasing all claims against Indiana Gas set forth in plaintiffs' First Amended Complaint in this matter. (First Amended Complaint, ¶ 46).

56. The Indiana Supreme Court granted transfer of the Indiana Court of Appeals *Gypsum* decision and on September 22, 1999, affirmed the original IURC decision. *United States Gypsum, Inc. et al.*

v. Indiana Gas Co., 735 N.E.2d 790 (Ind. 2000) (this opinion is also attached to Defendant Pro-Liance's Submission of Supplemental Authority, docket # 154).

IV. STANDARD OF REVIEW: MOTION FOR JUDGMENT ON THE PLEADINGS

Pursuant to Rule 12(c), a court may make a judgment on the pleadings after the pleadings are closed. FED. R. CIV. P. 12(c). In reviewing a motion for judgment on the pleadings, the court assumes veracity of the plaintiffs well-pleaded factual allegations and draws all reasonable inferences in favor of the plaintiff. *Gutierrez v. Peters*, 111 F.3d 1364, 1368 (7th Cir. 1997); *West v. Phillips*, 883 F. Supp. 308, 313 (S.D. Ind. 1994). However, the court is not obliged to accept mere unsupported conclusions of fact, nor must it ignore factual allegations in the pleadings that undermine the non-movant's claims. *Northern Ind. Gun & Outdoor Shows, Inc. v. City of South Bend*, 163 F.3d 449, 452 (7th Cir. 1998). The court is also not bound by the non-movant's legal conclusions. *National Fidelity Life Ins. v. Karaganis*, 811 F.2d 357, 358 (7th Cir. 1987); *McMahan v. Cornelius*, 756 F.2d 1156, 1157 (S.D. Ind. 1991). For example, in the antitrust context, a plaintiff cannot establish a viable cause of action capable of surviving a motion for judgment on the pleadings "by attaching bare legal conclusions to the facts he narrates: if he claims an antitrust violation, but the facts he narrates do not at least outline or adumbrate such a violation, he will get nowhere by merely dressing them up in the language of antitrust." *Sutcliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984).

A 12(c) motion for judgment on the pleadings, however, should only be granted in cases where the plaintiff cannot prove facts or any reasonable inferences drawn therefrom that would support his claim for relief. *Gutierrez*, 111 F.3d at 1368. Furthermore, a motion for judgment on the pleadings must be denied if there are any material facts to be resolved. *Northern Ind. Gun & Outdoor Shows*, 163 F.3d at 452.

V. DISCUSSION

A. Federal Antitrust Standing

In its motion for judgment on the pleadings, Indiana Gas argued that both plaintiffs, Midwest Storage and Midwest Services, lacked standing. This court disagreed with Indiana Gas in its September 29, 2000 Entry (docket # 153) and ruled that the plaintiffs did have standing.. However, after considering defendant ProLiance's second submission of supplemental authority in support of its motion to dismiss in connection with the Indiana Supreme Court's ruling in *Gypsum*, the court agrees with the defendants and finds that both plaintiffs do lack standing to bring their antitrust claims. *United States Gypsum, Inc. v. Indiana Gas Co.*, 735 N.E.2d 790 (Ind. 2000) (vacating *United States Gypsum, Inc, et al. v. Indiana Gas Co.*, No. 93A02-9710-EX-667 (Ind. Ct. App. Oct. 8, 1998) and affirming the Indiana Utility Regulatory Commission decision of September 12, 1997).

Plaintiffs bring all of their federal claims – Count I, II, III, IV, and V – pursuant to the Sherman Act, 15 U.S.C. § 1. For an individual, or entity, to bring an antitrust cause of action under the Sherman Act, section 4 of the Clayton Act provides that they must "be injured in his

business or property by reason of anything forbidden in antitrust laws." 15 U.S.C. § 15. Courts have narrowed the broad language of section 4 of the Clayton Act to limit parties to those "1) who have suffered the type of injury that the antitrust laws were intended to prevent (antitrust injury) and 2) whose injuries are a result of defendant's unlawful conduct (antitrust standing)." *In re Copper Antitrust Lit.*, 98 F. Supp. 1039, 1047 (WD. Wis. 2000) (citing *Serfcz v. Jewel Food Stores*, 67 F.3d 591, 595 (7th Cir. 1995).

Thus, establishing an antitrust injury is an integral part of establishing antitrust standing. To establish an antitrust injury, plaintiff must show "that the antitrust laws protect his or her interests and that the violation was the cause-in-fact of the injury." *Copper Antitrust Lit.*, 98 F. Supp. at 1048. As the purpose of antitrust laws is to protect competition, not competitors, standing is granted to those who are in the best position to vindicate the violation; in other words, "[w]hen the plaintiff's injury is linked to the injury inflicted upon the market . . . the compensation of the injured party promotes the purpose of the antitrust law – the preservation of competition." *Id.*

Antitrust standing, therefore, is limited to those "who can show 'a direct link between the antitrust violation and the antitrust injury.'" *AlliedSignal, Inc. v. B.F. Goodrich, Co.*, 183 F.3d 568, 575 (7th Cir. 1999) (quoting *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993). To make this determination, the court is to examine several factors: "(1) the causal connection between the antitrust violation and the plaintiff's injury; (2) the nature of the plaintiff's injury and the relationship between the plaintiff's injury and the type of activity sought to be redressed under the antitrust laws;

and (3) the speculative nature of the plaintiff's claim for damages and the potential for duplicative recovery or complex apportionment of damages." *AlliedSignal*, 193 F.3d at 575 (citing *Associate Gen. Contractors of Ca. v. California State Council of Carpenters*, 459 U.S. 519, 537-46 (1983)).

Recently, a federal court examined the antitrust standing of a public utility in a market context highly similar to this case. *Indeck Energy Serv., Inc. v. Consumers Energy Co.*, 234 F.3d 1268, 2000 WL 1529802 (6th Cir. 2000) (per curiam). The *Indeck* court determined that the only harm allegedly suffered by the plaintiff utility in that case was in its "capacity as a competitor, not as a defender of marketplace competition." *Id.* at *3. And, while the *Indeck* court noted that antitrust actions may be brought by competitors, it held that they "must at least allege that [their exclusion] from the marketplace results in the elimination of a superior product or a lower-cost alternative"; otherwise the antitrust damages alleged are simply too indirect and too speculative to justify federal antitrust jurisdiction. *Id.* The plaintiff in *Indeck* merely alleged that the defendant utility purchased necessary power from its affiliate producer and that consequently, the defendant excluded over eighty percent of the competition while keeping supplemental and alternative sources like plaintiff out of the market. *Id.*, at *1. According to the *Indeck* court, this type of allegation does not rise to the level of an antitrust injury because permitting the *Indeck* plaintiff to have antitrust standing based upon its allegations would lead to "routine disputes between business competitors [being] elevated to the status of an antitrust action, thereby trivializing the [Antitrust] Act because of its too ready availability." *Id.* at 2 (quoting *Capital Imaging*

Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc., 996 F.2d 537, 543 (2d Cir. 1993)).

Similarly, in this case, the Midwest Companies allege that ProLiance competes directly with Midwest Services and that it had taken away some of Midwest Services' potential customers thereby causing the plaintiffs to lose transportation fees and gas sales and preventing consumers from having alternative choices. (First Amended Complaint, ¶¶ 35, 38). Thus, like the plaintiff in *Indeck*, the Midwest Companies are suing in the "capacity as a competitor, not as a defender of marketplace competition." *Indeck*, 2000 WL 1529802, at *3. However, even if the Midwest Companies had alleged that their exclusion from the marketplace resulted in elimination of a superior product or lower-cost alternative, the court would still find that the plaintiffs had not established antitrust standing[3]

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[3] In addition to the fact that both Midwest Storage and Midwest Services fail to establish an antitrust injury, Midwest Storage also lacks standing because it is neither a consumer or a competitor. Antitrust standing is granted "only to those who, as consumers or competitors, suffer immediate injuries with respect to their business or property, while excluding persons whose injuries were more indirectly caused by the antitrust conduct." *Serfecz v, Jewell Food Stores*, 67 F.3d 591, 598 (7th Cir. 1995) (quoting *In Re Indus, Gas Antitrust Litig.*, 681 F.2d 514, 520 (7th Cir. 1982).

In their First Amended Complaint, plaintiffs indicate that Midwest Storage did not seek to compete with ProLiance in the relevant market, the market for transporting and selling gas to end users. (First Amended Complaint, ¶¶ 30, 38). Rather, Midwest Storage would compete with other pipelines, not marketers, to supply storage facilities to the direct market participants. (First Amended Complaint, ¶¶ 11, 14, 30). "Suppliers to direct market participants[, however,] typically cannot seek recovery under the antitrust laws because their injuries are too secondary and indirect." *Serfecz*, 67 F.3d at 597.

because such an allegation is undermined by the supporting documents attached to plaintiffs' First Amended Complaint. *Northern Ind. Gun & Outdoor Shows*, 163 F.3d at 452. Specifically, the Indiana Supreme Court case – which vacated the Indiana Court of Appeals case that was attached to plaintiffs' complaint as Exhibit H – affirmed the IURC's order and its findings. *Gypsum*, 735 F.2d at 803-04.

The IURC concluded that ProLiance has not detrimentally affected the gas transportation market: no anti-competitive price patterns have emerged and the affected markets are "as robust after the formation of ProLiance as they were prior to its formation." *Gypsum*, 735 F.2d at 804 (quoting IURC Sept. 27, 1997, at 54); *see also* IURC Sept. 27, 2007 Opinion, at 20-29; 40-42, 45, 55-58 (examining public interest and market affects).

Given the finding that the creation and operation of ProLiance is in the public interest and that "post-ProLiance, the market place continues to function with no ill effects", (IURC Sept. 27, 1997 Opinion, at 41), plaintiffs are unable to establish an antitrust injury as there was no injury to the relevant market, therefore, they lack antitrust standing. Furthermore all of plaintiffs federal claims[4] rely on the finding that ProLiance was improperly

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[4] *Count I* – Sherman Act § 1: Conspiracy between defendant Indiana Gas and Panhandle Eastern Pipeline ("PEPL") [to exclude plaintiffs from the relevant market and preventing them from competing with ProLiance];

Count II – Sherman Act § 1: Formation and Operation of Defendant ProLiance;

(Continued on following page)

formed and operated; thus, the Indiana Supreme Court's decision in *Gypsum* negates all of plaintiffs federal claims against Indiana Gas. Accordingly, defendant Indiana Gas' motion for judgment on the pleadings in now **granted** as to all of plaintiffs' federal claims.

B. Indiana Antitrust Standing

The Indiana Antitrust Act is patterned after the federal Sherman Antitrust Act, and when determining the adequacy of plaintiffs' Indiana state law antitrust allegations, this court can be guided by federal antitrust decisions. *McLane v. Pizza King Franchises, Inc.*, 1987-2 Trade Cases P 67,723,1987 WL 92061, *7 (Ind. Super. 1987). Indiana courts, in fact, have consistently interpreted the Indiana Antitrust Act with the Sherman Act and have ruled that the Indiana Act is not broader than the federal law. *Id.*

Thus, since the plaintiffs lack federal antitrust standing, this court may conclude that the plaintiffs lack antitrust standing for any Indiana state law antitrust claim. Accordingly, defendant Indiana Gas' motion for judgment on the pleadings is **granted** as to plaintiffs' Indiana state

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Count III – Sherman Act § 1: Tying [the sale of excess transportation to the purchase of gas commodity];

Count IV – Sherman Act § 2: Monopolization by defendant Indiana Gas independently and Indiana Gas through defendant ProLiance

Count V – Sherman Act § 2: Attempted Monopolization by defendants Indiana Gas and ProLiance

law antitrust claim contained in Count VII of the First Amended Complaint.[5]

VI. CONCLUSION

Plaintiffs Midwest Storage and Midwest Services lack antitrust standing for both their federal and state antitrust claims because they have failed to demonstrate the requisite antitrust injury. Consequently, defendant Indiana Gas' motion for judgment on the pleadings is hereby **granted** as to all Counts set forth in the Midwest Companies' First Amended Complaint. Defendant Indiana Gas is no longer a party to this matter.

It is so ordered this 20th day of April 2001.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana
Indianapolis Division

[5] The court notes that it dismissed plaintiffs' other state law claim, Count VI – Tortious Interference with Prospective Economic Advantage, in its January 8, 2001 Entry (docket # 175), which addressed defendant Indiana Gas' motion to correct errors (docket # 166).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST GAS SERVICES, INC., and MIDWEST GAS STORAGE, Plaintiffs,	)	IP 99-0690-C-Y/G
vs.	)	
INDIANA GAS COMPANY, INC., INDIANA ENERGY SERVICES, INC., and PROLIANCE ENERGY, LLC, Defendants.	)	

FINAL JUDGMENT

The court, having this day made its entry, now enters final judgment in favor of defendant Indiana Gas Company, Inc. It is now therefore adjudged and decreed that defendant's motion for judgment on the pleadings is hereby **granted**.

It is so ordered this 20th day of April 2001.

/s/ Richard L. Young
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana
Indianapolis Division

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 19, 2003

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Ilana Diamond Rovner, *Circuit Judge*
Hon. Ann Claire Williams, *Circuit Judge*

No. 01-2727

MIDWEST GAS SERVICES, INC., and MIDWEST GAS STORAGE, INC., *Plaintiffs-Appellants*, *v.* INDIANA GAS COMPANY, INC., INDIANA ENERGY SERVICES, INC., and PROLIANCE ENERGY, LLC, *Defendants-Appellees.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. IP 99-0690-C-D/F Richard L. Young, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by counsel for Plaintiffs-Appellants on February 5, 2003, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on the petition for rehearing en banc.[1]

Accordingly, the petition for rehearing is DENIED.

[1] Judge Ripple did not participate in consideration of this matter.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MIDWEST GAS SERVICES, INC., and MIDWEST GAS STORAGE, INC.,	)	
Plaintiffs,	)	**No. IP 99-0690-C-D/F**
v.	)	
INDIANA GAS COMPANY, INC., INDIANA ENERGY, INC., IGC ENERGY, INC., INDIANA ENERGY SERVICES, INC., and PROLIANCE ENERGY, LLC,	)	
Defendants.	)	

FIRST AMENDED COMPLAINT

Plaintiffs, Midwest Gas Services, Inc. and Midwest Gas Storage, Inc., complain of the defendants, Indiana Gas Company, Inc., Indiana Energy, Inc., IGC Energy, Inc., Indiana Energy Services, Inc., and ProLiance Energy, LLC, as follows:

PARTIES

1. Plaintiff Midwest Gas Services, Inc. ("Midwest Services"), is an Illinois corporation with a principal place of business in Hinsdale, Illinois, and is in the business of marketing, selling and arranging for the transport of natural gas, primarily in Indiana and Illinois.

2. Plaintiff Midwest Gas Storage, Inc. ("Midwest Storage"), is an Indiana corporation with a principal place of business in Clay County, Indiana, and owns a natural gas storage field in Clay, County, Indiana.

3. Defendant Indiana Gas Company, Inc. ("Indiana Gas"), is an Indiana corporation with a principal place of business located in Indianapolis, Indiana. Indiana Gas owns and operates a natural gas distribution system. Indiana Gas is known as a "local distribution company," or "LDC." It distributes gas as a regulated monopoly within the state of Indiana only, and not across state lines. Indiana Gas is engaged in rendering gas utility service in 50 counties in north central, central and southern Indiana. (See Exhibit A, the white portions of the map.) Indiana Gas is the principal subsidiary and business entity of Indiana Energy, Inc. ("Indiana Energy"). Indiana Energy is a holding company with subsidiaries and affiliates engaged in natural gas distribution, gas portfolio administrative services and marketing of natural gas, electric power and related services.

4. Defendant ProLiance Energy, LLC ("ProLiance"), is the unregulated marketing affiliate of Indiana Gas. ProLiance is owned jointly and equally by IGC Energy, Inc., and a wholly-owned subsidiary of Citizens Gas and Coke Utility ("Citizens Gas"). IGC Energy, Inc., is a subsidiary of IEI Investments, Inc., which in turn is a subsidiary of Indiana Energy. According to its March 15, 1996, Formation Agreement, ProLiance was formed by Indiana Gas, Indiana Energy, Inc., IGC Energy, Inc. and Indiana Energy Services, Inc. ("IES"), on the one hand, and Citizens Gas, together with Citizens By-Products Coal Company and their unregulated marketing affiliate, Citizens Energy Services Corporation ("CESCO"), on the

other hand. IES is the predecessor marketing affiliate of Indiana Gas.

JURISDICTION

5. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1337, 15 U.S.C. §§ 1, et seq., and pendent jurisdiction.

VENUE

6. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(c).

BACKGROUND ALLEGATIONS

7. Historically, natural gas and its transportation were bundled together and sold as one. Interstate pipelines companies used their monopoly power in the transportation of natural gas to create and maintain monopoly power in the purchase and sale of natural gas. Because of this, the price which could be charged was strictly regulated by federal and state agencies.

8. In the late 1970s and early 1980s, the Federal Energy Regulatory Commission ("FERC") began efforts to deregulate the natural gas industry to create competition for the purchase and sale of natural gas, culminating in FERC's order 636. As a result of deregulation, Interstate pipeline companies are required to "unbundle" the sale of natural gas from its transportation. They are required to make their pipelines available to entities other than themselves. Deregulation has in fact created competition in the interstate purchase and sale of natural gas, thereby lowering the price end users must pay.

The Indiana Utility Regulatory Commission ("IURC") also took steps to unbundle the intrastate sale of natural gas from its transportation. Unbundling by Indiana Gas began in the late 1980s with Rate 60, which applies to large, commercial and industrial gas purchasers. Under this and subsequent tariffs, eligible customers are permitted to purchase gas from entities other than Indiana Gas and to arrange for transport into Indiana Gas's distribution system. Indiana Gas is required by the IURC to accept transported gas into its system and deliver it to end users for a fee.

9. Among the purchasers of interstate transportation are gas marketers, which trade in the sale and purchase of natural gas and arrange for its transport to end users. Midwest Services is an independent gas marketer. Most interstate pipeline companies and LDC's formed affiliated marketing companies with whom Midwest Service has competed.

10. Midwest Storage purchased the Clay County storage field in 1989. FERC issued a certificate to Midwest Storage on April 30, 1991, which authorized Midwest Storage to provide firm and interruptible storage, which includes firm and interruptible transportation of natural gas into and out of Midwest Storage's storage field. (Midwest Storage's FERC certificate is attached as Exhibit B.)

11. Midwest Storage saw an opportunity associated with deregulation of the natural gas industry. Its storage field is equipped for short-term (peaking) and long-term storage of natural gas. The storage field was previously directly connected to the Terre Haute Gas Company's ("THGC") distribution system, which in turn was connected to the Texas Gas Transmission interstate pipeline

system, which brings gas into the area from Texas and Louisiana, which is generally a higher priced source of gas. Indiana Gas purchased the THGC distribution system in about 1990. The storage field is also situated within 14 miles of the Panhandle Eastern Pipeline interstate pipeline system, which brings gas into the area from the mid-continent region, which is typically a lower priced source of gas. Connecting to the two pipeline systems would permit Midwest Storage, its affiliates and other entities to take advantage of differences in gas prices between these two regions. Midwest Storage's storage services would also allow other entities to hedge against a lack of availability of, and the corresponding higher prices of, natural gas. In addition to saving on gas prices, these entities would save on transportation costs, storing gas at times when prices were lower and removing it from the field when the prices rose. Midwest Storage would earn its profits through storage fees and transportation.

12. Midwest Storage began to try to sell its storage services to Indiana Gas in 1989. Midwest Storage's field sits close to Indiana Gas's distribution systems. In fact, as set forth above, the storage field was connected to the THGC distribution system prior to Midwest Storage's purchase of the field, and Indiana Gas purchased the THGC distribution system shortly after Midwest Storage purchased the field. Midwest Storage's pipe was within 30 feet of an existing Indiana Gas gathering facility, and within one mile of another Indiana Gas system, the "Margaret Avenue Station Waterworks," which would have permitted additional volumes. Midwest Storage proposed to Indiana Gas that Midwest Storage connect to Indiana Gas's pipeline. Indiana Gas's customers stood to benefit by such an interconnect as set forth above.

13. Terrence O'Malley, Daniel O'Malley and Gregory Friedrich, on behalf of Midwest Storage and Midwest Services, corresponded and met regularly with representatives of Indiana Gas, including Gerald Ulrey, Curt Hribernik and John Talley. Indiana Gas declined to purchase gas storage from Midwest Storage.

14. Midwest Storage also wished to sell storage and transportation services directly to large, commercial and industrial users of natural gas who are served by Indiana Gas's distribution system. These commercial and industrial companies could then purchase gas when prices were low, such as in the summer months, ship the gas through the interstate pipeline system to Midwest Storage's field, and have the gas available closer to their plants when demand peaked and prices were high, such as during cold snaps. Storing gas would also save these industrial users on transportation costs during peak demand periods. Transportation rates are higher during peak demand periods. Midwest Storage entered into storage agreements with several companies to provide such services, including EME and US Gypsum.

15. In order to utilize Midwest Storage's field, however, the industrial users had to utilize the Indiana Gas distribution system. By virtue of its monopoly status as an LDC, Indiana Gas owns the only distribution facilities that can economically service these customers. This also required Midwest Storage to either connect directly to the Indiana Gas distribution facilities, or to redeliver storage gas to Indiana Gas via an interstate pipeline, e.g., Panhandle Eastern Pipeline ("PEPL"), so that gas could make its way from the storage field to the industrial users. A direct interconnect to the Indiana Gas pipeline from

Midwest Storage's field would have been the most economical way to do this, and would have provided the customers who are within Indiana Gas's service territory the greatest benefit.

16. Midwest Storage's repeated efforts to interconnect with Indiana Gas's distribution facilities throughout the early 1990s were met with repeated road blocks set up by Indiana Gas. For example, Indiana Gas's representatives articulated concerns about potential federal regulation to which it might expose itself by connecting to Midwest Storage's field. These Indiana Gas representatives also stated that they had to investigate the workings of the storage field before they would allow an interconnect, and they insisted on assurances that the gas that would flow through the pipeline would be of sufficient quality. Indiana Gas representatives later insisted, without explanation, that Midwest Storage's interconnect to Indiana Gas's distribution system wait until after Midwest Storage completed its interconnect to the PEPL system.

17. When Indiana Gas raised concerns, Midwest Storage representatives satisfied them. Midwest Storage provided Indiana Gas with information from its attorney that showed that Indiana Gas was not exposing itself to federal regulation by connecting to Midwest Storage's facility (Exhibit C). Indiana Gas already knew this, however. It has always been connected to interstate pipeline systems; that is how it gets its gas. Midwest Storage is a FERC regulated facility and Indiana Gas received its gas from FERC regulated pipelines, such as PEPL, Texas Gas Transmission and ANR. Midwest Storage representatives provided Indiana Gas with engineering studies reflecting the integrity of the field and gave assurances that the gas would be of sufficient quality. Monitoring equipment

Midwest Storage offered to install at its own cost would insure that only quality gas would make its way into the Indiana Gas distribution system. Indiana Gas knew that as well. It also knew that the interconnect at times would be used to directly transport gas from the interstate pipeline into Indiana Gas's system via the PEPL interconnect, without ever entering the storage field. Midwest Storage completed its interconnect to the PEPL system in September 1994.

18. Indiana Gas knew that the reasons it had given for refusing to interconnect were pretextual. Indiana Gas also knew that it would ultimately be forced by the IURC to allow the interconnect. So Indiana Gas finally relented and signed a Memorandum of Understanding in October 1994 that proposed an agreement to interconnect. But in its proposal, Indiana Gas insisted that Midwest Storage pay to construct all the measurement and regulation facilities for the interconnect and that Indiana Gas would own them and control them. Indiana Gas's request in this regard was unreasonable. This was just another stall.

19. Gregory Friedrich met with John Talley in December 1994 in an effort to resolve the interconnect issue and other issues. Following that meeting, Friedrich understood he had a commitment from Indiana Gas to allow the interconnect and to contribute $150,000 to the facilities upgrades, since Indiana Gas insisted upon owning those facilities, as reflected in Friedrich's December 13, 1994, letter (Exhibit D).

20. Talley wrote back to Friedrich, denying that Indiana Gas made any commitments to Midwest Storage to allow an interconnect. (A copy of Talley's December 19, 1994, letter is attached as Exhibit E.)

21. John Talley, Frank Lindsey and Curt Hribernik met with Daniel O'Malley and Gregory Friedrich on or about May 31, 1995. O'Malley and Friedrich were pressing for an interconnect on reasonable terms. At that time, Talley told O'Malley and Friedrich that the interconnect would be accomplished at the Margaret Avenue Station Waterworks, which at that time was owned by Texas Gas Transmission, but which Indiana Gas was in the process of purchasing. Talley predicted the interconnect would be completed in the fall of 1995.

22. Midwest Storage began efforts to clear the right-of-way in anticipation of the Margaret Avenue Station Waterworks interconnect.

23. Contrary to what was said at the May 31, 1995 meeting, on or about August 18, 1995, Lindsey wrote to Friedrich, telling him that there would be no more discussions about an interconnect "until an agreement has been signed between our companies." But Indiana Gas refused to enter into an interconnect agreement unless Midwest Storage agreed to pay for all the facilities and give title to those facilities to Indiana Gas. (See Frank Lindsey's February 8, 1996 letter to Terrence O'Malley, attached hereto as Exhibit F.)

24. Indiana Gas's stalling, and its placing unreasonable restrictions on allowing an interconnect, were for the purpose of preventing Midwest Storage, and its affiliate Midwest Services, from competing with Indiana Gas, its marketing affiliates, and PEPL, as further described herein. Indiana Gas never intended to permit an interconnect on any terms, but it concealed this intent from the Midwest Companies.

25. As set forth above, in order to comply with the obligation imposed upon Indiana Gas by the IURC to make transportation through its pipeline available to end users and marketers, Indiana Gas proposed, and the IURC approved, various tariffs that allowed end users to buy natural gas from other vendors, which would then be delivered to Indiana Gas's "Citygate" and then transported to the end user through Indiana Gas's distribution system.

26. Among the first such tariffs were Rates 60 and 70. Another such tariff is Indiana Gas's Rate 45, which was instituted in 1995, while Midwest Storage was pressing to get the interconnect it had sought for over five years. Under Rate 45, Indiana Gas was required to sell transportation to qualified purchasers through its pipeline at rates approved by the IURC. Qualified purchasers are commercial or industrial customers who use between 50,000 and 500,000 therms of natural gas annually.

27. Midwest Services began marketing to the Rate 45 customers. It set up a marketing staff under the direct of Gregory Friedrich, its president, particularly for this purpose.

28. Under Rate 45, Midwest Services was required to contact Indiana Gas to obtain usage data about potential Rate 45 customers to determine whether they were in fact eligible to participate. On information and belief, shortly after Midwest Services requested information about a particular customer, Indiana Gas would then contact that customer directly. Indiana Gas representatives would tell those customers that it had an unregulated marketing affiliate that could perform the same services.

29. Midwest Services anticipated delivering gas to Rate 45 customers, and other commercial and industrial

users under Rates 60 and 70, under two scenarios. First, Midwest Services anticipated delivering gas to Indiana Gas's distribution facilities, through the interconnect its sister company, Midwest Storage, was trying to convince Indiana Gas to allow it to build. This would have allowed Midwest Services to store cheaper gas it purchased during off-peak periods, when prices and transportation costs were lower, and sell it when demand was high. An interconnect would also allow Midwest Services to make an arbitrage profit by selling gas delivered from the PEPL pipeline system to customers who were otherwise constrained to purchase gas only from the Texas Gas Transmission pipeline, which was typically more expensive. Midwest Storage would earn transportation fees from Midwest Services under this scenario. As set forth above, Indiana Gas never allowed that to happen.

30. In addition, Midwest Storage proposed to deliver gas from its storage facility to the Indiana Gas distribution system through the PEPL system. Midwest Storage asked that it be designated a secondary "receipt/delivery point" pursuant to the transportation contracts between PEPL and Indiana Gas. This would have allowed Midwest Storage's facility to compete with other competitor pipelines and, in turn, would have allowed Midwest Services to compete in the market for the sale of gas and transportation to transport-eligible customers. The designation of secondary receipt and delivery points on interstate pipeline contracts are common, and normally routine.

31. Indiana Gas was, and now ProLiance is, PEPL's largest customer. Indiana Gas worked with PEPL to prevent Midwest Storage from becoming a secondary receipt/delivery point. Indiana Gas asserted that its

contracts with PEPL required a senior PEPL officer to approve Midwest Storage's receipt of gas each month. That was not in fact required by any contract, FERC rule or PEPL tariff.

32. While Midwest Storage was attempting to be made a secondary receipt/delivery point at Indiana Gas's receipt points on the PEPL pipeline, and while Midwest Storage was trying to get its interconnect from Indiana Gas, Indiana Gas was secretly in contact with PEPL. John Talley of Indiana Gas spoke with Beth Medlin from PEPL in early June 1995. Medlin summarized Talley's contact as follows in her internal, PEPL e-mail:

> John Talley informed me that Midwest Gas Storage was in his office about a week ago. It came up in the conversation that IGC could not put Midwest on their contract on a long-term basis because we have specified that receipt as a month-to-month deal. Apparently, Midwest hit the roof and promised to take it up with PEPL and/or FERC. I wanted ya'll to be warned, so that we are not caught off guard.

(Exhibit G).

33. Midwest Storage discovered this e-mail during its recent litigation against PEPL. Midwest Storage sued PEPL for its predatory conduct. The terms of that settlement are subject to a confidentially order. Indiana gas never informed Midwest Storage or Midwest Services that it was in contact with PEPL regarding the Midwest Companies. Despite the fact that the settlement was subject to a court imposed confidentiality order, John Talley telephoned Terrence O'Malley shortly after the settlement was consummated in August 1997. Talley asked O'Malley about the settlement. Talley did not hear

about the settlement from O'Malley or anyone else at the Midwest Companies.

34. Indiana Gas conspired with PEPL to keep Midwest Services from marketing gas to customers served by Indiana Gas's distribution system. Its intent was to put Midwest Storage and Midwest Services out of business because it feared the competitive threat the Midwest companies posed to its control of the sale, transportation and storage of natural gas in and around the central and southern Indiana area.

35. Because Indiana Gas refused to allow Midwest Storage to interconnect to Indiana Gas's distribution facilities, and because PEPL, together with Indiana Gas, would not make Midwest Storage a receipt/delivery point on their contracts, Midwest Storage and Midwest Services lost transportation fees. Midwest Services lost gas sales as further described herein.

36. Indiana Gas's refusal to permit an interconnect, and its conspiracy with PEPL to refuse to make Midwest Storage a receipt/delivery point, were for the purpose of benefitting Indiana Gas's marketing affiliates, ProLiance and IES. IES was formed in November 1994. It was an unregulated marketing company that competed with Midwest Services for the sale of natural gas. In order to sell gas, gas marketers must arrange to deliver transported gas to Indiana Gas's citygate. This was often accomplished by purchasing "released capacity" from Indiana Gas. That is, Indiana Gas was required to maintain considerably more available transportation than it would normally use. This was so Indiana Gas would not run out of gas during peak demand periods. As a regulated

utility, Indiana Gas was required to sell this excess capacity to IES, other gas marketers and industrial users on an equal basis. In December 1995, because it had not yet been able to form the ProLiance joint venture described below, Indiana Gas entered into a contract with IES under which IES became the exclusive supplier of gas and its transportation to Indiana Gas. IES was given control over all of Indiana Gas's supply resources, including commodity agreements and pipeline and storage capacity. Unlike Indiana Gas, a regulated monopoly which was required to release its considerable excess capacity to the general market, IES did not.

37. ProLiance was formed in March 1996 by Indiana Gas and its affiliates on the one hand, and Citizens Gas and its affiliates on the other hand. Citizens Gas is a regulated utility that has controlled the sale and distribution of natural gas in and around Indianapolis. Indiana Gas and Citizens Gas contracted with ProLiance to handle all of Indiana Gas's and Citizens Gas's gas supply functions, and Indiana Gas and Citizens Gas transferred their key personnel to ProLiance to handle these functions. Indiana Gas and Citizens Gas also transferred their personnel from their unregulated marketing affiliates (IES and CESCO) to ProLiance.

38. ProLiance competes directly with other gas marketers, such as Midwest Services. ProLiance markets to the large, commercial and industrial customers Midwest Services contracted with and hoped to contract with. ProLiance also services all of Indiana Gas's and Citizens Gas's needs. As of March 16, 1996, all of Indiana Gas's and Citizens Gas's gas supply resources, including commodity agreements and pipeline and storage capacity, were transferred to ProLiance, without competitive bidding and

at little or no cost. Like IES, ProLiance also refuses to release its considerable excess capacity to the general market. Like Indiana Gas was, ProLiance is required to maintain considerable excess capacity so that it is certain to have sufficient available transportation to meet Indiana Gas's and Citizens Gas's customers' needs during peak demand periods.

39. Indiana Gas was actively involved in the formation of ProLiance. Its employees, John Talley, Curt Hribernik and Jerry Ulrey, among others, worked with Citizens Gas to create ProLiance. Indiana Gas employees participated in many steering group meetings to help create ProLiance.

40. ProLiance now controls most of the available, primary, firm, interstate transportation of natural gas into Indiana Gas's distribution system. In a marketing plan that Indiana Gas prepared relating to the formation of ProLiance, Indiana Gas recognized that ProLiance's control of the transportation of gas into Indiana's Gas's service area would give ProLiance a competitive advantage over other marketers.

41. Indiana Gas, as an LDC, controls all of the transportation of natural gas within its service area, which is the north central, central and southern portions of Indiana, comprising 50 counties. (See Exhibit A.)

42. Indiana Gas holds monopoly power in the relevant market through its LDC status and through its subsidiary's, ProLiance's, control over the transportation of gas *into* its system off of interstate pipelines. The relevant market ("the market") for purposes of this case is the market for transporting and selling gas to end users that are allowed by tariff to receive transported natural

gas in the 50 counties in north central, central and southern Indiana in which Indiana Gas is an LDC. Upon information and belief, ProLiance controls a large majority of the market share in the relevant market.

Commercial and industrial gas users in the market have limited options in purchasing natural gas to meet their peak demands. First, there is little or no firm transportation available to purchase because it is controlled by ProLiance. Purchasing primary, firm transportation is cost prohibitive to most commercial and industrial users who are eligible to transport gas, and ProLiance refuses to release the substantial, unused capacity it maintains to service the utilities.

Second, Midwest Storage owns the only independent storage facility in the area. But Indiana Gas has refused to allow Midwest Storage to connect its storage field to the Indiana Gas pipeline system, and Indiana Gas has conspired with PEPL to deny Midwest Storage access as a receipt/delivery point on Indiana Gas's (now ProLiance's) contracts with PEPL. There is no other available, independent storage facility in the market. Therefore, transport-eligible customers do not have the option of storing gas in an independent storage field to meet their peak demands.

The lack of these other options has caused transport-eligible customers to purchase bundled transportation and commodity from ProLiance, or from some other entity that purchased bundled service from ProLiance.

43. Indiana Gas's parent, Indiana Energy, through ProLiance, has profited greatly as a result of its anti-competitive conduct. According to Indiana Energy's 1999 10-K, pretax earnings recognized by Indiana Energy from

ProLiance totaled about $9.2 million, $7.4 million and $8.9 million in 1999, 1998 and 1997, respectively.

44. According to Indiana Energy's 1999 10-K, on or about August 11, 1998, Indiana Gas, Citizens Gas and ProLiance each received a Civil Investigative Demand ("CID") from the United States Department of Justice requesting information relating to Indiana Gas's and Citizens Gas's relationship with and the activities of ProLiance. The Department of Justice issued the CID to gather information regarding ProLiance's formation and operations, and to determine if trade or commerce has been restrained.

45. The Indiana Appellate Court issued an opinion on October 8, 1998, holding that Indiana Gas violated Indiana Law by forming ProLiance without proper regulatory approval (Exhibit H). That case is now before the Indiana Supreme Court.

46. In November 1998, Indiana Gas conditioned any further discussions with Midwest Storage concerning an interconnect on Midwest Storage releasing Indiana Gas from the claims set forth herein (Exhibit I).

COUNT I – SHERMAN ACT, § 1: CONSPIRACY

47. Plaintiffs reallege and incorporate by reference as though fully set forth herein paragraphs 1 through 46.

48. Indiana Gas conspired with PEPL in restraint of trade in the relevant market in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

49. Neither Indiana Gas nor PEPL wanted an independent, working gas storage field in the relevant

market that would allow Indiana Gas's customers an alternative to purchasing gas and transportation through IES and ProLiance, or purchasing gas other than through a long-term, firm transportation agreement from PEPL. Nor would PEPL and Indiana Gas permit Midwest Services to compete with IES and ProLiance by selling gas delivered on the PEPL pipeline. Indiana Gas's conduct has substantially affected interstate commerce.

50. Midwest Storage and Midwest Services have been injured by the conspiracy between Indiana Gas and PEPL. Plaintiffs have been unable to profit from Rates 45, 60 or 70, or to otherwise compete with ProLiance in the sale of natural gas. Plaintiffs have lost the transportation fees and marketing profits they otherwise would have earned had they been permitted to compete for the sale of gas.

WHEREFORE, Midwest Storage and Midwest Services request this Court to enter judgment in their favor and against defendant Indiana Gas for the full amount of their damages, treble damages, attorneys' fees and costs, and to grant any other relief this Court deems just.

COUNT II – SHERMAN ACT, § 1: PROLIANCE

51. Plaintiffs reallege and incorporate by reference as though fully set forth herein paragraphs 1 through 46.

52. The joint venture between Indiana Gas and its affiliates, and Citizens Gas and its affiliates, to form and operate ProLiance is a combination for purposes of Section 1 of the Sherman Act, 15 U.S.C. § 1.

53. The formation and operation of ProLiance by Indiana Gas and its affiliates has created an unreasonable

restraint of trade in the sale of natural gas and its transportation in the relevant market. Indiana Gas's conduct has substantially affected interstate commerce.

54. Midwest Storage and Midwest Services have been injured by the illegal formation and operation of ProLiance. They have been unable to profit from Rates 45, 60 or 70, or to otherwise compete with ProLiance in the sale of natural gas. Plaintiffs have lost the transportation fees and marketing profits they otherwise would have earned had they been permitted to compete for the sale of gas.

WHEREFORE, Midwest Storage and Midwest Services request this Court to enter judgment in their favor and against Indiana Gas, Indiana Energy, Inc., IGC Energy, Inc., IES and ProLiance for the full amount of their damages, treble damages, attorneys' fees and costs, and to grant any other relief this Court deems just.

COUNT III – SHERMAN ACT, § 1: TYING

55. Plaintiffs reallege and incorporate by reference as though fully set forth herein paragraphs 1 through 46.

56. The market for the sale of natural gas and the market for its transportation are distinct. ProLiance (IES formerly) has tied the sale of the excess transportation it controls to the purchase of the gas commodity. Transport-eligible customers and gas marketers have been forced to purchase the re-bundled product because transportation is not otherwise readily available at competitive rates. ProLiance has refused to sell its excess capacity to the general market unless purchasers also purchase the gas commodity.

57. ProLiance (IES formerly) has appreciable economic power in the market for the sale of transportation to transport-eligible customers and marketers. The effect on the market for the sale of gas commodity has not be insubstantial transportation. Plaintiffs have lost the transportation fees and marketing profits they otherwise would have earned had they been permitted to compete in the relevant market.

58. Midwest Storage and Midwest Services have been injured by ProLiance's and IES's illegal tying. Plaintiffs have been unable to profit from Rates 45, 60 and 70, or to otherwise compete with ProLiance and IES in the sale of natural gas and its transportation. Plaintiffs have lost the transportation fees and marketing profits they otherwise would have earned had they been permitted to compete in the relevant market.

59. ProLiance's and IES's affiliates have knowingly profited from ProLiance's and IES's illegal tying.

WHEREFORE, Midwest Storage and Midwest Services request this Court to enter judgment in their favor and against Indiana Gas, Indiana Energy, Inc., IGC Energy, Inc., IES and ProLiance for the full amount of their damages, treble damages, attorneys' fees and costs, and to grant any other relief this Court deems just.

COUNT IV – SHERMAN ACT, § 2: MONOPOLIZATION

60. Plaintiffs reallege and incorporate by reference as though fully set forth herein paragraphs 1 through 46.

61. Indiana Gas has maintained its monopoly power in the distribution of natural gas in the relevant market as

an LDC. Indiana Gas and ProLiance have willfully acquired and maintained monopoly power in the sale of natural gas to transport-eligible customers within the relevant market.

62. Indiana Gas willfully acquired, and through ProLiance has maintained, its monopoly power in the sale and transportation of natural gas in the relevant market by refusing to grant Midwest Storage access to its essential facilities; that is, its distribution system. Indiana Gas has exclusive control of its distribution system. Midwest Storage and Midwest Services cannot practically or reasonably duplicate the distribution system. Indiana Gas has denied Midwest Storage and Midwest Services access to those facilities on reasonable terms. There is no good reason for Indiana Gas's refusal to permit Midwest Storage and Midwest Services access to Indiana Gas's distribution system on reasonable terms; it would have benefitted Indiana Gas's rate payers.

63. Indiana Gas also willfully acquired, and ProLiance has maintained, a monopoly on the sale and transportation of natural gas through monopolistic leveraging. ProLiance (IES formerly) has exercised monopoly power as the owner of most of the primary, firm transportation of gas into the market to prevent Midwest Services and other entities from competing with ProLiance in the sale of natural gas within the relevant market. ProLiance does not release capacity to other marketers. Rather, ProLiance re-bundles the sale of gas and its transportation by requiring that entities purchase gas from ProLiance in addition to purchasing transportation. Further, Indiana Gas and ProLiance have used the substantial supply resources Indiana Gas accumulated as a result of its public function of serving its captive customer base to leverage substantial

competitive advantages for IES's and ProLiance's marketing efforts. Defendants' conduct has substantially affected interstate commerce.

64. Midwest Storage and Midwest Services have been injured by defendants' acquisition and maintenance of monopoly power. Plaintiffs have been unable to profit from Rates 45, 60 or 70, or to otherwise compete with ProLiance in the sale of natural gas. Plaintiffs have lost the transportation fees and marketing profits they otherwise would have earned had they been permitted to compete for the sale of gas.

WHEREFORE, Midwest Storage and the Midwest Services request this Court to enter judgment in their favor and against Indiana Gas, Indiana Energy, Inc., IGC Energy, Inc., IES and ProLiance for the full amount of their damages, treble damages, attorneys' fees and costs, and to grant any other relief this Court deems just.

COUNT V – SHERMAN ACT § 2: ATTEMPTED MONOPOLIZATION

65. Plaintiffs reallege and incorporate by reference as though fully set forth herein paragraphs 1 through 46.

66. Indiana Gas and ProLiance have the specific intent to suppress competition in the relevant market.

67. Indiana Gas has acted predatorily by denying Midwest Storage and Midwest Services access to its essential facilities, that is, its distribution system. Indiana Gas has exclusive control of its distribution system. Midwest Storage and Midwest Services cannot practically or reasonably duplicate the distribution system. Indiana

Gas has denied Midwest Storage and Midwest Services access to those facilities.

68. Indiana Gas and ProLiance have also acted predatorily through monopolistic leveraging. Indiana Gas has exercised its power as an LDC, and ProLiance has exercised its power as the owner of most of the primary, firm transportation of gas into the market area, to prevent Midwest Services and other entities from competing with ProLiance in the sale of natural gas within the relevant market. Further, Indiana Gas and ProLiance have used the substantial supply resources Indiana Gas accumulated as a result of its public function of serving its captive customer base to leverage substantial competitive advantages for IES's and ProLiance's marketing efforts. Defendants' conduct has substantially affected interstate commerce.

69. There is a dangerous probability that Indiana Gas and ProLiance will succeed in obtaining monopoly power in the relevant market if they have not already acquired it.

70. Midwest Storage and Midwest Services have been injured by Indiana Gas's and ProLiance's predatory conduct. They have been unable to profit from Rates 45, 60 or 70, or to otherwise compete with ProLiance in the sale of natural gas. They have lost the transportation fees and marketing profits they otherwise would have earned had they been permitted to compete for the sale of gas.

WHEREFORE, Midwest Storage and Midwest Services request this Court to enter judgment in their favor and against Indiana Gas, Indiana Energy, Inc., IGC Energy, Inc., and ProLiance for the full amount of their

damages, treble damages, attorneys' fees and costs, and to grant any other relief this Court deems just.

COUNT VI – INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

71. Plaintiffs reallege and incorporate by reference as though fully set forth herein paragraphs 1 through 46.

72. Indiana Gas, IES and ProLiance knew of Midwest Services' potential to compete with IES and ProLiance in the Rates 45, 60 and 70 markets, and their potential to earn transportation fees and marketing profits through the sale of natural gas in the relevant market.

73. Indiana Gas, IES and ProLiance intentionally interfered with Midwest Services's and Midwest Storage's efforts to compete in those markets.

74. Indiana Gas's, IES's and ProLiance's conduct was illegal, as set forth in Counts I through V, incorporated herein by reference.

75. There was no lawful justification for Indiana Gas's, IES's and ProLiance's conduct.

76. Midwest Services lost the gas sales it otherwise would have earned, and both Midwest Services and Midwest Storage lost transportation fees they otherwise would have earned, had defendants not unlawfully interfered.

WHEREFORE, Midwest Storage and Midwest Services request this Court to enter judgment in their favor and against Indiana Gas, IES and ProLiance for the full amount of their damages, treble damages, attorneys' fees

and costs, and to grant any other relief this Court deems just.

COUNT VII – INDIANA ANTITRUST ACT

77. Plaintiffs reallege and incorporate by reference as though fully set forth herein all of the allegations of Counts I through V and allege herein that Indiana Gas's, Indiana Energy, Inc.'s, IGC Energy, Inc.'s, IES's and ProLiance's conduct as set forth therein is in violation of the Indiana Antitrust Act (Ind. Ann. Stat. §§ 24-1-2-1 et seq.) and has caused the injuries alleged in those Counts.

WHEREFORE, Midwest Storage and Midwest Services request this Court to enter judgment in their favor and against Indiana Gas, Indiana Energy, Inc., IGC Energy, Inc., IES and ProLiance for the full amount of their damages, treble damages, attorneys' fees and costs, and to grant any other relief this Court deems just.

/s/ Peter King
One of the Attorneys for Plaintiffs

Peter M. King
William H. Jones
Canel, Davis & King
10 S. LaSalle Street
Suite 3400
Chicago, Illinois 60603
(312) 372-4142

Todd A. Richardson
Lewis & Kappes
One American Square
Suite 1700
Indianapolis, Indiana
46282
(317) 639-1210